SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 174.

GEORGE B. CLUETT and others, Appellants, vs. HORACE B. CLAFLIN and others, Appellees.	In Equity.

Brief for Appellants.

This is a suit in equity, originating in the Circuit Court of the United States for the Southern District of New York.

The parties to the suit are as follows:

Plaintiffs: George B. Cluett, J. W. A. Cluett and Robert Cluett, constituting the firm of George B. Cluett, Brothers & Co.

Defendants: Horace B. Claflin, John Claflin, Edward E. Eames, William S. Dunn, D. N. Force, H. J. Fairchild and Daniel Robinson, composing the firm of H. B. Claflin & Co.; and Solomon Tim, Louis Tim, Maurice Ober, J. O'Sullivan, Edward Wallerstein and Max Herman, composing the firm of Tim, Wallerstein & Co.

The bill of complaint is brought upon Letters Patent of the United States No. 156,880 for an "IMPROVEMENT IN SHIRTS" granted to Robert Cluett November 17, 1874, and assigned

to the plaintiff firm June 28, 1875 (*Record*, p. 342). The bill charges infringement of the patent, and prays for profits and damages by reason thereof, and for an injunction (pp. 1–5).

The defendants duly appeared and made answer, the answer setting up three defenses:

Non-infringement;
Anticipation;
Want of patentable novelty.

The plaintiffs made reply (p. 10), and thereby issue was joined.

Proofs were taken, and upon the final hearing, on the pleadings and proofs, the cause was decided against the plaintiffs; and on June 9, 1887, a decree was entered dismissing the bill with costs to the defendants (p. 672).

From this decree the present appeal is taken.

The opinion of the Court below, upon which the decree was based, is found on pages 669–671 of the record.

This opinion sets forth the *object* of the patented invention, with statement of the *nature* of the same and quotation of the *claims*, and then proceeds to a discussion of the various defenses.

As regards the defense of *prior invention*, the opinion dismisses as not worthy of serious consideration all the testimony offered in support of the allegations of prior use or invention, except that relating to an alleged prior use at Chatham, New York. As to this particular use, the Court, although judiciously declining to make it conclusive against the patent, in the presence of what it deems a superior defense, plainly intimates that if there were no other defense it would deem the use at Chatham to be fully established and to be an anticipation.

The defense which the Court does hold conclusive is that of "want of patentable novelty," in view of the established state of the art.

Assignment of Errors.

The appellants respectfully submit that the Court below is in error upon two points:

1. In finding upon the evidence that "it can hardly be said that there is a reasonable doubt remaining regarding this Chatham anticipation" (p. 670).
2. In ruling that, even if the constructions covered by the claims of the patent are not directly anticipated, "the patent must be declared invalid for want of patentable novelty" (p. 670).

It is for the purpose of securing a reversal of judgment upon the questions presented by these two assignments of error that the present appeal is taken and prosecuted.

As to the *Chatham shirt* (illustrated by Exhibit A), the appellants contend, *first*, that under any tenable construction of the claims it does not embody the invention of the patent; *secondly*, that the testimony regarding its manufacture is too untrustworthy and uncertain to justify a finding that the shirt was made at an earlier date than the Cluett invention.

As regards the defense of *non-invention*, the appellants contend that the patented invention is not only essentially different from any one specific thing existing in the earlier art, but is not the logical outgrowth of all or any number of the prior constructions considered in gross—in other words, that, notwithstanding all that is shown to have had an earlier existence, the production of the patented article required the exercise of that degree of ingenuity and of those indefinable mental processes to which the law attaches the term "invention."

This latter contention of appellants derives large support—

(1) From the action of the Patent Office in granting the patent after fully considering those things, or at least some of those things, which seem to have had the most weight in influencing the Court against the patent.

(2) From the manifold advantages which the patented construction has over the earlier ones.

(3) From the large favor with which the new construction was received by the public.

(4) From the wide public acquiescence accorded to the patent for years after its issue.

(5) From the various earlier attempts to obviate the difficulties which were first successfully overcome by this invention.

(6) From the large number of patents which have since appeared for modifications of the fundamental invention embodied in the patent in suit; several of which later patents have been taken out by some of the very persons who are here defendants, and some of them also by this inventor, Robert Cluett, himself.

The accompanying sheets of sketches are intended to illustrate, on an exaggerated scale for greater distinctness, the construction of the Cluett shirt, the alleged infringements, and the various typical things in the prior state of the art—as well as the alleged Chatham anticipation, Exhibit A.

Nature of the Patented Invention.

The invention is styled in the patent an "*Improvement in Shirts.*"

This improvement relates to that class of shirts in which there is a bosom made out of linen or similar material, adapted to be starched and ironed, and thus by laundering rendered rigid or stiff, as contradistinguished from a shirt

of cotton or woolen fabric designed to have the bosom part as well as the body left flexible and unlaundered for use.

While the patent does not state all this in direct terms, it is a plain inference from the contents of the specification, and is positively asserted by plaintiffs' expert—his statement in this regard not being questioned by the defense.

Mr. Benjamin says (p. 15):

> "I understand, further, that the invention relates to a shirt made of a material adapted to be laundered to fit it for use, that is to say, a shirt wherein the body is of muslin or similar material and in a flexible or semi-flexible condition, and wherein the bosom is of one or more layers of linen or similar material and starched, ironed, or otherwise finished to be rigid or stiff; a shirt having the features as stated, in contradistinction to a shirt made from a cotton or woolen fabric (such, for instance, as flannel or knit goods) and wherein the body and bosom of the shirt are both flexible and intended to be so in the finished shirt—that is, a shirt wherein no starch or other stiffening material is employed to put it into condition for use."

The invention has to do with the mode of preparing the bosom part and of attaching it to the body of the shirt—the claim on the part of the plaintiffs being that the resultant product is a superior article of manufacture as compared with the goods of this class produced by the modes of preparing and inserting bosoms in vogue at and prior to the date of the present invention.

By the old methods (Sheet III., *infra*), the practice was to cut the bosom out somewhat larger than it would be when finished up; and, then, if the bosom was made of a single ply or layer, to turn the raw edges in under, and, laying the bosom on the body, to attach it thereto by stitches passing through the two near the margin of the bosom, as illustrated in the Perkins patent, p. 414. In case the bosom was made up of two or more plies or layers, it was customary to turn the raw edges of each ply inwardly and between the plies, and then, if the body of

the shirt was not cut out in front, to attach the bosom to the body by laying it on the latter, and sewing through the turned-in edges and the body. If, however, the front of the body was cut out, it was customary to introduce the raw edge of the material composing the shirt body in between the turned-in edges of the two plies of the bosom, and then to connect the parts permanently by a single row of stitches.

The object in thus turning in the raw edges of the bosom was to conceal them from sight, and, so far as such result would follow therefrom, to keep them from raveling.

Such constructions, however, were found to be seriously defective, and in more ways than one.

1. While in this way the raw edges of the bosom were withdrawn from sight, they were not effectually prevented from raveling. Even though turned in between two layers of the bosom, the severe manipulation to which such articles are always and necessarily subjected in the processes of the laundry, causes these raw edges to fray, and the loose threads work in beneath the outer ply of the bosom and become clotted with starch (Benjamin, x-Q. 14, p. 22). By repeated launderings, these threads become more and more expanded in size; in the words of Mr. Benjamin (x-Q. 15, p. 22), they tend to "bunch up and absorb starch and to form rough spots, destroying the appearance and finish of the bosom"—this being, in fact, the disfigurement spoken of in the patent.

2. The bosom formed in this way, and having no other support than what was derived from the turned-in edges, was liable to rumple easily and to break with the movements of the body.

3. A special difficulty lay in the impossibility of turning the edges in evenly, and of securing the bosom to the

body without inequality of outline and tension at different points. The work had to be done by hand, and even the most skillful, and when exercising the greatest care, found it a difficult task.

The difficulty of securing uniformity in the tension of the bosom was specially manifest when the outline of the bosom was curved.

Any lack of uniformity in the tension was sure to make itself manifest when the shirt was laundered; it would then be most difficult, if not impossible, to iron the bosom evenly and smoothly. It was liable to wrinkle or pucker.

4. With a bosom formed and secured in place in this way the heaviest wear, both in use and in the laundry, would come on or near the edges; and when these were worn out the bosom, as a whole, had to be discarded, even though the other parts might be perfectly good. Also, the turned-over edge of the outer ply of the bosom, when starched and ironed, had a sharp cutting action, and was liable to cut or fray out the adjacent parts of the shirt body.

It was the object and effect of the patented invention to obviate, practically, these various defects. This desirable and highly useful result is secured by the expedient of leaving the edges of the overlying layers of the bosom perfectly flat, and then "pocketing" them by means of a binding strip of similar material, "cut from the piece" as distinguished from the use of a tape. When this binding strip is used on a bosom with a curved outline, it is to be cut "on the bias," so that it can be applied evenly and without wrinkles, and continuously to all parts of the edge.

This binding is spoken of in the patent as a "folded binding," by which it is meant (as the expert, Benjamin, fully ex-

plains on page 17), that the raw edges of the binding strip are to be folded in under the strip itself. The object of this is apparent, since manifestly it is as important to conceal the raw edges of the binding as to conceal the raw edges of the bosom itself. It would be but little gain to pocket or conceal the latter, if, in doing it, one were to expose the equally objectionable raw edges of the former. Hence, special note should be made of the qualifying word "folded," thus used to indicate the mode of pocketing the edges of the binding strip itself as illustrated in the several figures of the patent drawing.

As to the function and nature of this binding, Mr. Benjamin, p. 17, says:

> "Its office * * I understand to be the pocketing or covering of the raw edges and loose threads of the bosom or bosom and shirt body. *The binding is described as folded. This I understand to refer to the edges of the binding.*" [1]

By leaving the edges of the bosom flat, it is a perfectly easy matter to apply such a binding as this to the bosom without bringing any strain or tension on the different parts of the bosom; and, after the binding is thus secured to the bosom it is a perfectly easy matter to sew this bound bosom to the shirt body without putting any one part of the bosom under tension or strain as compared with the other part.

The net result is a shirt in which there is no liability that the bosom will be disfigured by the loose threads or raw edges of either the bosom or the binding strip; in which the whole structure is stiffened, strengthened and made more durable by the presence of a binding strip, which—especially when it has been filled with starch, which it holds like a pocket—acts

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[1] It is to be noted, also, that the limitation to a "*folded*" binding, in claim 1, was not in the claim as originally drawn, although *in the specification* the binding had been spoken of as folded; but this limitatiod was introduced into the claim by amendment—and presumably, therefore, intelligently (p. 661).

like a frame to support the bosom and give it strength; and which thus prevents its rumpling or breaking; and in which the different parts of the bosom are not wrinkled or fulled up during the making, or put under unequal strain or tension, but lie smooth and even.

Thus is fully secured the multifold object set forth in the patent, at page 341:

> "The object of my invention is, first, to avoid the folding in of the edges of the bosom, and the raw edges and loose threads thereof, which disfigure the bosom when so folded in; second, to stay the bosom, rendering it firmer in itself and less likely to rumple or break; third, to avoid wrinkling of the bosom by the unevenness or fulling up of any one of the layers composing the bosom in any part thereof."

Another valuable object, not named in the patent, is secured by this construction, as follows:

The hardest wear of a shirt bosom attached to the outer surface of the shirt body comes upon the *edge* of such bosom --this being the part most exposed to abrasion from the clothes of the wearer, and injury from hard rubbing on the washboard, and from contact with the sad-iron. If the wear at this point is taken by a mere binding strip, as soon as this is worn out it can be removed and the bosom be rebound—a manifest gain as compared with a construction where this destructive wear comes in the first instance upon the unprotected edge of the shirt bosom itself, obliging that the entire bosom be discarded as soon as the edge is worn through.

The patent is printed on pages 341-2, and again, with the drawing, on pages 407-9.

The claims are as follows:

"1. In combination with a shirt body, a shirt bosom bound on the outer edge with a folded and stitched binding, and attached to the shirt body by a separate line of stitching through such binding.

"2. The shirt bosom S, composed of two or more thicknesses of cloth, B L., bound on the outer edge with the binding B″, and secured to the shirt front F by a line of stitching O."

The differences between these claims seem to be as follows:

The first claim is broad enough to cover a bosom made of a *single* thickness of material, as well as of more thicknesses; the second claim is limited to a case in which the bosom has, at least, *two* layers or plies.

By the first claim the bosom is to be attached to the body by a "*separate*" line of stitching—*i. e.*, one separate from that which attaches the binding to the bosom—and this separate line of stitching passes "through the binding." In the second claim these conditions are not present.

In the first claim the folded binding is spoken of also as "stitched;" meaning apparently that it is secured to the bosom by stitches other than the "separate line of stitching" which attaches the bosom to the body. In the second claim the binding is spoken of simply as "binding B″;" which description is satisfied by reference to the pocketing or folding under of the raw edges of the binding, and cannot properly be held to include the mode of attaching such folded binding to the edge of the bosom by wrapping it around such edge.

Infringement.

The alleged infringements are three in number—Claflin Shirts No. 1, No. 2 and No. 3.

Claflin Shirt No. 1:

This has a bosom which is shield-shaped in outline and made up of two plies; the edges of the bosom are left flat, but are pocketed by an enclosing strip of linen; the edges of the binding strip are also pocketed by being folded within the body of the binding; one line of stitches fastens this folded binding strip to the edge of the bosom; and another line of stitches, passing through the outer edge of this binding, fastens the bosom to the shirt body.

Plainly, this form of defendants' shirt infringes both of the claims of the patent.

Claflin Shirt No. 2:

In this shirt the bosom is shield-shaped and made up of two plies or thicknesses; the flat edges are pocketed by a binding strip, which is attached to the edges by a special line of stitches; and both edges of this strip are folded in under so as to be effectually pocketed. The only difference between this shirt and Shirt No. 1 is that in No. 1 the bosom is attached to the body by a separate line of stitches passing *through the binding*, while in No. 2 the line of stitches which secures the bosom and the body together passes through the bosom just inside the binding.

It is respectfully submitted that the words "through the binding," in claim 1, are words of description merely and therefore negligible, and not words of limitation. If this be so, the line of stitching in Claflin Shirt No. 2, whereby the bosom is attached to the body, is the equivalent of the stitching spoken of in claim 1 as "a separate line of stitching through such

binding," so that the shirt would be an infringement of the claim. Certainly the two rows of stitches in the two cases perform the same functions.

If, however, the concluding words of claim 1 are regarded as necessary words of limitation, so that the shirt No. 2 cannot be held under this claim, it certainly is an infringement of claim 2, which, as shown above, contains no limitation as to the location of the row of stitches that secure the bosom to the body.

Claflin Shirt No. 3:

This shirt, like No. 2, is a manifest attempt to evade the patented construction, but at the same time it embodies, although by a more complicated organization and an unnecessary and wasteful consumption of material, all the advantages which attach to the patented device.

In this form of defendants' shirt the raw edges of the bosom, instead of being *enclosed* by a folded binding, are enclosed by a fold in the edge of the shirt body, where the latter has been cut out to receive the bosom; but this exposes a raw edge of the *shirt body*, and this has to be enclosed or protected by a binding strip, the edges of which are turned in under so as to be completely concealed. Two lines of stitching are used, one of which attaches one edge of the folded binding to the body of the shirt, and the other of which passes through the other edge of the binding strip, and also through the bosom and the body.

It must be conceded that this form of shirt can be held under claim 1 only upon the construction which makes the concluding words of the claim words of description merely, and not words of limitation. Thus interpreted, claim 1 would seem to be infringed.

But however it may be as to claim 1 it is confidently urged that this form infringes claim 2. The bosom is made up of two layers; through the use of a folded binding strip ("binding B″") the raw edges of the flat bosom are "pocketed," as also

are the raw edges of the binding strip itself; and the bosom is secured to the shirt front by a line of stitching, which, although not separate from, but the same as, the line which secures the binding to the bosom, is really "the line of stitching O" of claim 2, for this claim does not require the stitching which unites the bosom and the body to be separate from that which unites the bosom and the binding.

Nor does the *flat* form of the binding in shirt No. 3 relieve the shirt from the charge of infringement. Although, in this respect differing from the form of binding shown in the patent drawing, this difference is not matter of substance. The binding is still a "folded binding" (binding B″); and it is through its presence that all the advantages contemplated by the patent are secured to this form of shirt. Benjamin says, with reason, on page 18:

> "The method of associating the parts as shown in defendants' shirt now under consideration produces or makes in the finished shirt an article substantially identical with that shown and described in complainants' patent. The relation of the parts as stated is somewhat different, but the effect of the conjunction of the several parts in the completed shirt is substantially the same. The binding covers, includes and practically conceals all the raw selvedge edges and loose threads."

This third form of Claflin shirt is that which is shown and described in the Herman Patent No. 322,717 of July 21, 1885, printed at page 455 of the record. The Herman named in this patent is one of the defendants, and the patent was issued to the firm of Tim, Wallerstein & Co., all the members of which are of the number of the defendants.

An examination of this patent shows that the patentee had in mind substantially the same points as Cluett had in making the invention of the patent in suit—the object of Herman's invention, as set forth in his patent, being "to save labor and at the same time produce greater uniformity in the appearance of bosom shirts."

The Claflin Shirt No. 3 should be held an infringement.

Alleged Anticipation by Prior Use.

The attempt is made by the defendants to defeat the patent in suit by proving various prior uses.

These alleged anticipations are located in three different places—in Philadelphia, in the City of New York and in Chatham, New York.

It was only in regard to the proofs connected with the alleged prior use at Chatham that the Court below seems to have had any doubt; the proofs offered to support the other alleged uses having been dismissed by the Court as wholly unworthy of belief. On this point the Court said as follows (pages 669 and 670), italics ours :

> " A voluminous mass of testimony has been returned upon the question of prior use. The greater part, however, may be laid aside, when it is remembered that this defense must be established by proof as explicit and convincing as that required to convict a person charged with crime—proof which preponderates the complainants' testimony not only, but which *satisfies the mind beyond a reasonable doubt. The evidence upon this question is full of contradictions and improbabilities and furnishes another illustration of the difficulty of arriving at the truth from human testimony.*
>
> " *Although corruption, prejudice and self-interest may be wholly absent, it is well-nigh impossible for a witness, no matter how intelligent he may be or how retentive his memory, to recall the details of ordinary transactions occurring twelve or fifteen years before.* Even the most intelligent and incorruptible witnesses are here proved to have been mistaken in important particulars, and others, not so intelligent or virtuous, are contradicted and discredited. It is thought that the testimony falls below the standard required by the rule referred to, unless it be the proof of prior use at Chatham, New York. Two witnesses who made bound-bosom shirts similar to the patented shirt were called, and, at great length and with careful attention to details, told the manner of construction and the experiments which led to the adoption of that style of shirt.
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> " But the character of one of these witnesses, Ford, was compromised by an attempt upon his part to sell the knowledge he possessed for a large amount of money, and the Court should hesitate to accept his story were it not corroborated by the testimony of the County Judge of Columbia County, whose character is conceded by all to be entirely beyond repoach. Judge McClellan positively and with reiteration testifies that he bought bound-bosom shirts prior to 1870, and gives facts and circumstances which render it quite improbable that he is in the wrong. To be sure, he is shown to be mistaken

> as to minor details in a few instances, but upon all material questions his testimony remains entirely unshaken, and, when taken in connection with the evidence of Ford and Clark, it can hardly be said that there is a reasonable doubt remaining regarding the Chatham anticipation."

The appellants agree fully with the finding of the Court in regard to the alleged prior uses in Philadelphia and New York, but take exception to the finding of the Court in regard to the use at Chatham. Therefore, the latter only need be here considered.

The defendants seek to establish the alleged prior use at Chatham by the testimony of three witnesses—Hiram M. Ford, who had a small gents' furnishing store at Chatham from 1865 to 1880, and who, it is claimed by defendants, made the Exhibit A; Myron E. Clark, who was an employee of Ford, and who succeeded to Ford's business in 1880; and Hugh W. McClellan, who bought from Ford some of the alleged anticipating shirts.

As regards the value of this testimony appellants says:

1. The shirt made by Ford (said to have been like Defendants' Exhibit A—although this exhibit is not one of the original shirts, but was made at a date subsequent to Cluett's invention, and certainly as late as 1879, if in fact, it be not a fraudulent exhibit, made for the purposes of this suit) did not embody the invention covered by the claims of the Cluett patent. If like Exhibit A, they did not have the "folded binding," which is an essential element of the patented invention.

2. The witness Ford is shown to be utterly unreliable, his character, as the Court below found, having been "compromised by an attempt on his part to sell the knowledge he possessed for a large amount of money."

3. The witness Clark was so connected with Ford, such are the contradictions appearing in his testimony, and such

the inexactness of his statements that the gravest suspicion must attach to his evidence.

4. The testimony of Judge McClellan, while that of a man whose character is beyond reproach, is not such as to command respect. His memory is shown to be defective; his recollection of the dates at which he purchased shirts of Ford prior to 1874 (the year when Cluett made his invention) is not satisfactory; his description of the shirts purchased in those early years is most uncertain; and even though he spoke with greater exactness than he does, in his attempt to describe minute details of construction of shirts he had purchased nearly twenty years before, it is submitted that his testimony upon such a point would be utterly unreliable.

A court should hesitate long before such testimony by a single witness, no matter how respectable the man may be, is accepted, for the purpose and with the effect of overthrowing a patent that has been so largely respected by the public, and has enabled its owners to build up a large and prosperous manufacturing industry.

Considering these and the connected questions more in detail, the following facts are to be noted:

First. The defendants do not produce any shirt actually made by Ford or by Clark, or purchased and worn by McClellan, prior to 1874, the date of Cluett's invention. The claim is made that prior to that date Ford, aided by Clark, made, and that,

among others, McClellan bought of Ford, shirts *like Defendants' Exhibit A* (see Sheet II., *infra*).

The date of this Exhibit A, also known as the "Mambert shirt," is wholly uncertain. It was found in the year 1885 by Clark in a package of old shirts then in the possession of Smith & Clark (successors in business of the witness Ford), and was then purchased by Isaac H. Mambert, a drummer in the employ of Mack & Co., who are defendants against this same Cluett patent in the companion suit No. 175 of the present docket. Clark, on request, produces the bundle of shirts from which Exhibit A was taken, and testifies (x-Q. 343, x-Qs. 359-363, pp. 569-571) that of the thirteen remaining shirts five were made by himself, five by Smith & Clark, one probably by Ford prior to 1880 (the date at which Smith and Clark succeeded Ford) and the remaining two by outside parties. He thinks that the one assigned to Ford must have been made by Ford, because, he says, (x-Q. 360): "The bosom is larger than I have any re-" membrance of having made since I did the cutting, and as I " have no recollection of making it as distinct from any other." This apparently would have been as good a reason for assigning this shirt Exhibit A to "an outside party" as to Ford.

Clark's story about this shirt is that it was made by Ford, at some uncertain date prior to 1880, for a man named J. H. Mambert, who, Clark says, once gave an order for two shirts and took one of them and paid for it, but never called for the other. He assumes it to have been made for J. H. Mambert, because his name appears stamped upon the shirt with a rubber stamp; but how or when that stamp was made is not satisfactorily explained. J. H. Mambert, the farmer, being produced by the plaintiffs in rebuttal, testifies (pp. 275-6) that he did once order from Ford two shirts; that he paid for them, took them away and wore them out; and that that was the only order for shirts that he ever gave Ford. This, he thinks, was in 1877, but it might have been in 1878 or 1879.

It is submitted that the evidence does not establish that the shirt Exhibit A was ever made by Ford.

Second. An examination of the shirt Exhibit A fails to reveal the presence in it of the invention patented to Cluett. It does not contain the "folded binding" which is an essential of the invention. An examination of the exhibit shows that the under edge of the binding is not "folded." Instead of being folded upon itself so that its raw edge is pocketed, it is left flat, and thus this edge is liable to become raveled in the manipulations of the laundry, and its loose threads to work in under and disfigure the bosom. In other words, there is present in this Exhibit A one of the very defects which it was the object of the Cluett invention to overcome.

A section of this shirt, on an enlarged scale, to show the arrangement of the binding, is to be found on the sheet of sketches accompanying this brief.

Third. Then, again, aside from Exhibit A, no one of the three witnesses, Ford, Clark and McClellan, describes a shirt having a "folded binding," such as is described in the Cluett patent and such as would serve all the functions of that binding.

Fourth. Not only do the witnesses fail to produce any of the original shirts made by Ford prior to 1874, but they are wholly unable to produce any *books or memoranda* for the purpose of establishing the dates at which it is claimed they made the anticipating shirts.

Order books and books of account were kept by Ford, and some of these books were left with Smith and Clark when Ford went out of business (*Clark*, x-Qs. 166–179, 313–317, pp. 556, 567), and repeated references are made to these books by Ford and Clark, but when the books are called for they are unable to produce them (*Clark*, p. 270; *Ford*, p. 195). Ford, when pressed for the books, claims that they have been destroyed (p. 195).

Fifth. The Chatham story not only gains no strength, but it is absolutely discredited, by the character of the principal actor and witness, *Ford*, and by the glaring contradictions in his testimony.

Ford (pages 465–489) kept a gents' furnishing store at Chatham, New York, from the year 1864 to 1880, and claims to have made bound-bosom shirts like Defendants' Exhibit A continuously during all those years. In 1880 his business was sold out to Smith & Clark, and in 1882 the business passed into the hands of Clark alone.

The testimony of this witness is valueless to support the contention of the defendants.

1. As regards the character of this witness, the Court below (page 670) says as follows:

> "*The character of one of these witnesses, Ford, was compromised by an attempt on his part to sell the knowledge he possessed for a large sum of money.*"

The evidence on which the Court based this estimate of Ford's character is found largely in the testimony of the witness himself, supplemented by that of Wallerstein, one of the defendants herein, and of Mack, one of the defendants in the companion suit No. 175.

Ford admits that he met Wallerstein some three months or more before he was called to the stand, and then bargained with him that he should pay one thousand dollars provided he (Ford) could furnish evidence "sufficient to break the patent, or if a compromise was made" (x-Q. 124). For this sum he was to place "a perfect chain of evidence in the hands of defendants" (x-Q. 126). If the patent was not broken and no compromise made, the witness was to lose nothing, but was to receive "lawful expenses, subpœna fees and mileage" (x-Q. 131).

Although brought to the witness stand by a subpœna, and

apparently answering some questions with reluctance, Ford declares this bargain to be still subsisting, and that he expects "to hold the defendants to the payment of the one thousand dollars" (x-Qs. 128–130, x-Q. 141, pp. 475–6).

It also appears that in the month of August, 1885—shortly before the bargain with Wallerstein—Ford was engaged in negotiations with Mr. Mack, of the firm of Mack & Co., defendants in the suit No. 175. He told Mack that he "could help him out," but would not do so "without being compensated." When asked whether he would do it for $200, he says, "My reply was that I was no $200 man. He (Mack) then asked me what I would take. I said it was worth $1,000 or nothing" (x-Q. 149, p. 477).

On pages 665–667 appears a correspondence had between Ford and Mack & Co. on the 3d, 4th and 5th of September, 1885, in relation to this same matter, in which Ford offers "to break the patent" on the payment of one thousand dollars to his wife; said Ford "to give an affidavit in full, and to appear in Court at any time, upon payment of lawful witness fees, when called, and give testimony in full of such facts and to furnish affidavits or testimony, as may be desired, of other parties, so far as I am able, to substantiate my own."

Mack & Co., replying to this proposition, say that "the conditions are reasonable enough;" but because Mack & Co. desired a little more time "to get the desired co-operation of some others" before paying the money, this second bargain with Mack & Co. seems never to have been consummated.

So, also, Mack testifies (x-Q. 22, page 655) that Ford told him "that the patent was good for nothing, and he could break the patent; that he did not propose to give any affidavit unless he was paid for it, and he wouldn't give an affidavit as was wanted unless he was paid $1,000."

Wallerstein says (Q. 6, page 652) that Ford told him "that Mack would not get his testimony unless he would pay him."

2. For the purpose of effecting this corrupt bargain with Wallerstein and with Mack & Co., this venal witness endeavored to impress these parties with the idea that the Cluetts were endeavoring to bribe him to suppress the supposedly damaging facts that he possessed.

Wallerstein (Q. 6, page 652) says that Ford told him that "Cluetts had sent for him and offered him $800 to sell his prior right of having made this shirt, but he would not sell the right."

Mack also testifies (x-Q. 22, page 655) that Ford stated to him during their negotiations that "the Cluetts had offered him $800 to not testify in any case to what he knew regarding the manufacture of the bound-bosom shirt."

All three of the Cluetts deny most positively that they ever had any conversation with Ford on this subject (pages 160–1, 271–2, 273–4); and Ford himself (Q. 270, page 488) admits that he never had any such conversation with the Cluetts. The fact then is established that no such conversations took place; but it is equally proven that Ford told Wallerstein and told Mack that the Cluetts had tried to purchase his silence.

3. Another instance of the recklessness of this witness is found in his testimony regarding his knowledge of the Cluett patent prior to his coming upon the stand.

He had for some months been engaged in his corrupt negotiations with Wallerstein and with Mack, whereby he was to furnish them with "a perfect chain of evidence," with which "to break the Cluett patent;" and yet on the stand, on December 8, 1885 (x-Q. 218, page 484), he asserts that he never saw the Cluett patent until "a week ago to-morrow"—that is, until December 2, 1885. Such statement is absolutely inconsistent with the language of the contract which Ford sent to Mack on September 3, 1885, for Mack & Co. to sign. In this draft of contract (page 666) Ford says: "For the sum of $1,000, to my

wife Helen A. Ford in hand paid, I do hereby agree to give to Messrs. Mack & Co. all the facts in connection with my formerly manufacturing a bound-bosom shirt similar to shirt as specified and claimed in a patent issued to George B. Cluett November 17, 1874."

Again (x-Q. 48–50, page 470), he explains when and how he first heard of the Cluett patent. He says it was in 1882, when, being measured for a shirt by Garry of Troy, Garry said that he could not make for Ford such shirts as he then had on, as they were patented. Ford proceeds, "I then said, 'Give me "the date of this patent.' *He gave me the date.* * * * I "then said he [*Cluett*] could not sustain his patent." Six days after, this same veracious witness says (x-Q. 213–14, pages 483–4): "I never knew the date of the patent obtained by George B. Cluett, Bro. & Co." "x-Q. 214. Did not Mr. Garry give you the date? A. No, sir."

When asked on re-direct (Q. 247, page 486) to reconcile his statements in answer 50 with those in answer 214 he confesses himself wholly unable to do so.

Again, he asserts in x-Q. 220, page 484, that nobody except Mr. Garry had "explained the patent or the invention"—meaning the Cluett patent and invention—to him until the day when he was called as a witness, December 2, 1885. This of course is simply incredible, in view of the fact that he had for months been bargaining with Mack and with Wallerstein to furnish the evidence with which "to break the patent."

4. If anything further were needed to discredit this witness it might be found in his constant reference to his books, as if those would corroborate his statements.

In his letter to Mack of September 3 (p. 665) he tells Mack that if he will bring the thousand dollars to Chatham the next Saturday morning "all affidavits, &c., *with my old books*, can be pushed over to you," &c.

Again, in answer to Q. 24 (p. 468), he says that he made

shirts like Exhibit A for Henry R. Thomas, of Troy, "prior to 1870—*the books will show;*" and in answer to x-Qs. 174 to 196 (pp. 480-482), he makes constant reference to his books, as if they were still in existence, either in his own possession or with Smith & Clark, except some which he asserts to be in his own family in an injured condition. He, however, sturdily refuses to send for any of these books or to produce them for examination, giving as his reason (x-Q. 196, p. 482): "There is nothing contained therein appertaining to this case;" and this notwithstanding the admitted fact (x-Qs. 198-9) that when in business he was in the habit of keeping "order books" which contained "measurements" and "directions as to style of shirts or how the orders were to be made up."

Coupling his persistent refusal to even consent to the production of these books with his statement (209 x-Q., p. 483) that he is unable to "now fix the date of the manufacture of any particular lot of shirts" made by him "on which the binding was used upon the bosom for any particular person," or to "give the name of any such person," it would seem a fair inference that this witness at least believed that the books, if produced, would not corroborate his story.

It is nothing surprising then, that, when subpœnaed at a later day to produce the books, he should declare himself unable to find them. This is no more than what might be expected of such a witness.

Sixth. The testimony of the witness *Clark*, again, (while plaintiffs have no wish to impeach his honesty), is untrustworthy and inconclusive.

The substance of his testimony is that in 1868 he became an employee of Ford; that in 1869 Ford began making shirts like Exhibit A; that the manufacture of such shirts was continued by Ford in a small way down to 1880, when Ford went out of business; that he, Clark, succeeded Ford in 1880, buy-

ing out his stock and good-will and receiving his order books; that, subsequently, the firm of Smith & Clark was formed, succeeding to the same business; and that he, Clark, and the firm of Smith & Clark continued in a small way to make shirts like Exhibit A down to the time when he testified.

The following observations as to this witness are in order:

1. He nowhere describes the shirts made by Ford and by himself as an employee of Ford, prior to 1874, as having a "*folded* binding;" and, as hereinbefore explained, Exhibit A, presented as illustrating the shirts made by Ford, does not have *the folded binding* of the Cluett patent.

2. While Clark testifies (Q. 13, p. 543) that Ford began making shirts like Exhibit A in 1869, on cross-examination (x-Q. 61) he finds himself unable to give the date when this manufacture began.

It should be noted in this connection that Ford claims an earlier date for making these shirts, and thus the two witnesses are in direct conflict.

3. It appears that Clark had been carefully coached by Mambert, employee of the defendants in the Mack (or McNeany) suit No. 175, before he became a witness, and when put upon the stand he was examined by leading questions.

His deposition was taken February 16, 1886, but on September 1, 1885, Mambert, in the interest of the defendants in the Mack suit, had obtained from Clark the affidavit printed on page 664, in which Clark is made to describe the shirts made by Ford in 1869 and 1870, *in the exact language of the Cluett patent.*

Moreover, Clark admits various consultations between himself and the discredited witness Ford, before and during the taking of his deposition; and this, too, with the full understanding on Clark's part that Ford was endeavoring to defeat

the Cluett patent, and was to receive one thousand dollars in case of success (x-Qs. 92–108, x-Qs. 112, 118–121, pp. 550–2).

When Clark appears as a witness, instead of being asked to describe *from memory* shirts made by Ford, Exhibit A is put before him and his testimony is guided by its presence (12 Q., p. 542). Afterward, when asked to "describe in words the exact way in which you [he] made shirts like defendant's Exhibit A, in 1869, and in subsequent years" (23 Q., p. 543), he shows his utter unreliability. Instead of answering the question ingenuously, he says:

> "I cannot specify the shape of bosom made in 1869, nor I can't "specify the years in which the changes of shape were made in the "bosom. We bound the bosom, using a bias binding in 1869 and during "all the years subsequent. We bound the bosom with a bias binding strip "the same in result that this is. We put on the same as in Defend-"ant's Exhibit A, and the shirt in general cut, design and pattern is "the same shirt except as regards shape of bosom."

4. This witness gives no reason whatever for fixing upon the year 1869 as the date when the manufacture by Ford of shirts like Exhibit A was begun; and his untrustworthiness in regard to this date is made apparent by his testimony concerning the time when he and Ford first saw the advertisement of the Cluett bound-bosom shirt. This date he fixes *in the year 1875*, in which year he says the Cluetts had a full-page advertisement in the "Gents' [*Men's*] Furnishing Trade Review," giving a cut not only of their patented shirt, but also of their collars and cuffs. Ford was a subscriber to this trade paper, and this advertisement was discussed by Ford and Clark (Qs. 17 and 20, p. 543; x-Qs. 136 to 143, p. 553; x-Q. 302, p. 556).

Now, the fact is that No. 1 of Vol. 1 of the *Men's Furnishing Trade Review*, according to the evidence of the publishers and of the *Review* itself, was not published until February, 1878; and the first page-advertisement inserted by the Cluetts was in September, 1878; and not until December, 1879, did the Cluetts have a page advertisement containing a cut of their

shirt, accompanied by cuts of collars and cuffs (*Clucas*, pp. 326–327).*

It thus appears that Clark must have been from three to five years out of the way in fixing the date at which he and Ford first saw this conspicuous advertisement of bound-bosom shirts as made by the Cluetts, although its appearance led to a discussion between him and Ford that should have fixed the date accurately in their minds. If Clark's memory is no more exact as to the dates when he made shirts like Exhibit A for Ford, it is utterly worthless.

5. While plaintiffs do not charge that Clark expected to profit by the thousand dollars which he says (x-Q. 111, p. 551) he believed that Ford was to receive in case the Cluett patent could be defeated, it abundantly appears that he had another powerful reason for doing all that he could to aid Ford in his attack upon the patent.

He acknowledges (x-Q. 135, p. 553) that it had occurred to him that he was liable to be sued under the Cluett patent for the manufacture of the shirts which he had sold, in like manner as the Troy concerns were liable to such suit.

For the foregoing reasons it is submitted that the testimony of the witness Clark should have no weight in support of the alleged anticipation at Chatham; and very properly it was regarded by the Court below as in itself of little, if any, value.

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*No. 8, Vol. I., September, 1878, contains the first page-advertisement of the Monarch bound-bosom shirt, printed in that review. No. 1, Vol. II., February, 1879, has a cut of the shirt, but not of collars and cuffs. No. 5, Vol. II., May, 1879, has cut of a shirt, with cuffs, but no collars. No. 6, Vol. III., December, 1879, has the first full-page cut showing shirt, collars and cuffs.

Seventh. The testimony of *Judge McClellan* (whose statements seem to have impressed the Court below) is regarded as equally inconclusive with Clark's.

Judge McClellan, who undoubtedly is a man of probity, was sixty-five years of age when he was called to the stand as a witness in the year 1886. He claims to have bought of Ford, at Chatham, prior to 1870, and on two or three occasions, shirts like Exhibit A; and he even enters into details as to the special construction of the same, by which the bosoms of the shirts then bought were united to the bodies of the garments.

A critical examination of McClellan's testimony will show not only that it would be unjust to the Cluetts to make it the instrument of destroying their patent, but that it would establish a precedent that would imperil all patent property of this class.

1. It seems incredible that any person not skilled in this particular art should assume to remember, sixteen or eighteen years back, just how a particular shirt then bought by him was made. The extraordinary character of this attempted feat of memory will come home to the members of the Court if they will try to recall, as to any of the garments composing their wardrobes of twenty years ago, how the same were made as regards any of the more inconspicuous details thereof.

2. It will be noticed, however, that even this witness is very cautious at times, and is handled by his counsel with caution.

Thus, in answer 7 (p. 575) he gives his "*impression*" as to how far the stitching extended along the binding in the first shirts bought of Ford.

After giving (Q. 5, p. 574) a most general description of the shirts first bought by him of Ford, he says (Q. 9, p. 575) that all of the shirts bought prior to 1870 were "of the description I have given here, *as near as I can tell.*"

Then follows this extraordinary question and answer (Q. 10, p. 575):

> "Q. 10. Please look at Defendants' Exhibit A, and, after examining the same, tell us whether it resembles or differs, *so far as you can observe*, from the shirt made for you by Ford between 1867 and 1870, and worn by you during that time and after?
>
> "A. Yes, sir; this is just such a shirt as I have worn—just such bosom."

3. It should be kept in mind always that this witness was testifying with the shirt Exhibit A before him; but, even so, he makes very blundering work when he comes to give the details of construction of those shirts bought from Ford and which he undertakes to describe by reference to Exhibit A. He acknowledges (x-Q. 93, p. 585) that he never dissected the seams of one of the Ford shirts so as to examine its construction; also (x-Q. 103, p. 586) that he cannot say whether he ever saw a shirt made by Ford or his successors that had "a continuous binding on the sides and around the bottom of the bosom;" and, although he had examined Exhibit A before he was sworn, and although he had Exhibit A in his hand in the examination room, he acknowledges his inability to state how the seam is constructed without ripping it up (x-Q. 83, x-Q. 91, pp. 583–84).

4. It abundantly appears that before this witness was called to the stand he had been interviewed on two or three occasions by Ford and Mambert, and that in such interviews his recollection had been stimulated by the exhibition to him of a patent with drawings—undoubtedly the patent in suit (x-Qs. 108–114). Speaking of one of these interviews—probably with Mambert—he says, referring to the interviewer:

> "He said, in substance, that he had been informed that I had bought shirts of Mr. Ford several years ago; and shirts with a bosom that was bound with linen or something, and wanted to know if I had used such shirts bought of Ford; and I told him I knew Ford used to make such shirts, and he asked how long ago it was I had

seen such shirts or had such shirts of Ford, and *described how they were bound ;* and I thought a moment and I think I told—that it must have been seventeen or nineteen years ago ; a *good while ago anyway ;* I told him when.

" *He showed me a paper that had a diagram and printed form of claim for a patent in giving me a description, and to see if what I recollected at all corresponded with that.*" * * *

From this it will be seen that the memory of this witness was *educated* by the men who were working up this line of defense. It is not surprising, therefore, that when this witness comes to the stand and undertakes to testify up to the standard which his mentors have laid down, he constantly recurs to "Exhibit A" as a sufficient description of the shirts which he bought of Ford ; and for the same reason it is not surprising that he makes a sad exhibition when called upon to make description of the details of construction of those shirts.

5. This witness gives no good reason for his statement that he bought shirts like Exhibit A of Ford *prior to 1870.*

McClellan removed from Albany to Chatham in 1867 ; in February, 1870, he removed from Chatham to Hudson, returning to Chatham in May, 1872 (x-Q. 16, p. 576). He says that between 1867 and 1870 he bought all his shirts of Ford ; that after his removal to Hudson he bought his shirts of Ball & Bros. of Troy, and thinks that he continued to buy their shirts for two or three years after his return to Chatham in the spring of 1872 (x-Q. 127, p. 589) ; but he admits that after his return to Chatham he resumed his custom of trading with Ford (p. 577).

"24 x-Q. After your return to Chatham did you resume your custom of trading with Mr. Ford?

"A. I did to a certain extent ; that is, if Mr. Ford was at that time carrying on his business there, but I did not deal so wholly with Mr. Ford.

"25 x-Q. Did you purchase shirts from Mr. Ford after your return to Chatham or Hudson.

"A. I did either from him or Mr. Clark, in the same

establishment. I don't know who was running it then—either Ford or Clark, one of them.

"26 x-Q. When did you make the last purchase from either Ford or Clark? I mean of shirts.

"A. It is impossible for me to tell you, sir, but it is several years ago."

McCllelan testifies that he has no receipted bills of goods purchased of Ford, nor any memorandum or other form of documentary evidence whereby to establish the dates of any such purchases (x-Q. 105, p. 586); and, in the absence of such data whereby to refresh his recollection, and in view of the fact that he purchased shirts of Ford after his return to Chatham as well as before he went to Hudson, it is submitted that he may be wholly wrong in thinking that any of the shirts bought before 1870 were like Exhibit A. It is not unreasonable to suppose that McClellan is four or five years out of the way in his dates on this point, when we consider that Clark made a mistake of four or five years as to the date when he and Ford first saw Cluett's full-page advertisement.

6. There is abundant evidence in the record that McClellan's memory in regard to the matters here in controversy is anything but exact and reliable.

Thus, while he claims to have a distinct recollection in regard to shirts bought of Ford prior to 1870—as to whether they had a binding or not, his mind is an absolute blank as to this feature in regard to the shirts which he subsequently bought of Ball Brothers (x-Qs. 134 and 135, page 590).

So, also, he says that he has bought shirts of Clark since Clark has been in business alone at Chatham—that is, since 1880; but, when asked whether *such* shirts had a binding like Exhibit A, he says, "I am not sure," and when urged to give his "impression" about it he says, "Well, I haven't any impression one way or the other" (Qs. 27-30, p. 576). But immediately after (Q. 32) he says, "I think that all the shirts I ever got of Clark were, I should say, just like this Defend-

ants' Exhibit A, but I will not swear positively to that." And yet these Clark shirts were bought within five years of the time when the witness was testifying.

Then, again, the inaccuracy of this witness' recollection is shown in his conflicting accounts as to *the shape* of the bosom in the first shirts that he claims to have bought of Ford. In answer 5 (page 574) he says that in the first shirts bought of Ford the bosom came down "in a curve at the lower end;" and in x-Q. 21 (page 576) he says that *all* the shirts purchased of Ford between 1868 and 1880 were made in accordance with the description in answer 5. In answer to x-Q. 42, however (page 579), he says, speaking of the shape of the bosom in those first shirts, "I am not sure as to shape;" and in answer to x-Q. 67 (page 582), he says that he thinks "the sides of the bosom were nearer straight than in the exhibit here," Exhibit A; and in x-Q. 69–70, he says that the two sides were "quite straight" and that "there was no binding on the bottom of these shirts." Again, in answer to x-Q. 71 (page 582), speaking of these same shirts, he says: "Whether the first order had the sides of the bosom straight or were curved, as in the exhibit, I cannot say;" and in answer to x-Q. 100 (page 586), he is wholly at sea as to whether the bosoms of the first shirts bought of Ford were straight or curved, and on the next day he says (x-Q. 149), "To-day I doubt in regard to my first purchase being a straight-sided bosom."

Another instance of the unreliable character of this witness' memory is found in connection with the affidavit of Clark, printed on page 664. This affidavit was written out by Judge McClellan with his own hand and in his own office, and contains an important extract from the Cluett patent, and moreover was written out by him on the very day of his interview with Ford and Mambert with reference to his own purchase of shirts from Ford; and yet, when the Judge is questioned about the matter, he has wholly forgotten that Clark ever made such an affidavit before him; (x-Qs. 153 to 160, pp. 593–4).

It is respectfully submitted that a witness who cannot remember whether shirts bought within *five* years had a binding on the bosom, cannot be trusted in his statements as to the binding of bosoms in shirts bought *eighteen* years before; that a witness who cannot remember even the *shape* of the bosoms of shirts purchased eighteen years before, is not competent to testify as to other and more inconspicuous features of construction of those same shirts; that a witness who from day to day varies his testimony in regard to so prominent a feature as the shape of the bosom of a shirt—at one time making the sides straight and at another curved, and then professing his uncertainty in the matter—cannot be relied upon in respect to the presence of a binding upon the bosom, or the character of such binding if present, or the mode by means of which such binding if present was secured in place.

In short, it seems to the appellants that it was a grave mistake on the part of the Court below to place any reliance upon the testimony of the witness McClellan, however upright and well-intentioned the gentleman may be.

To defeat a valuable patent which has worked a valuable improvement in a great and valuable industry, upon testimony so unsubstantial, would be to establish a most dangerous precedent.

Appellants cannot see why the criticism of the Court below, upon this general class of testimony, does not apply to the deposition of Judge McClellan with the same force as to that of the witnesses produced in support of the other alleged anticipations. The Court said:

> "Although corruption, prejudice and self-interest may be wholly absent, it is well-nigh impossible for a witness, no matter how intelligent he may be or how retentive his memory, to recall the details of ordinary transactions occurring twelve or fifteen years before."

As a conclusion from all the testimony respecting the alleged prior manufacture of shirts at Chatham, appellants respectfully submit that it is grossly insufficient to establish dates that anticipate the Cluett invention (in the spring of 1874). The burden of proof is upon the defendants (the appellees); and they must make out their case beyond a reasonable doubt. This they have failed to do.

Alleged Want of Patentable Novelty.

In considering this defense careful attention must be given to the various things in the prior state of the art upon which the defendants specially rely in support of their conclusion of non-patentability, as distinguished from direct anticipation. It is believed that all these things are fairly represented by the following:

Conger Patent No. 146,656, January 20, 1874.

Marr Patent No. 134,909, January 14, 1873.

Nichol's British Patent No. 1594 of 1864.

Detached shirt bosoms or "dickies with binding around the edges."

Dress shirts with separately formed bosoms inserted or attached by turning the raw edges in or under, and then sewing through such folded edges and the shirt body, but without the use of a binding.

Firemen's shirts reinforced on the bosom.

1. *The Conger patent.*

This patent, as well as the Marr patent, was referred to by the Patent Office in connection with the grant of the patent in suit (p. 661).

This is a patent for *undershirts*, and not for dress shirts.

This undershirt is to be of *flannel or knitted goods*, and not of linen or some other material to be laundered. On the front of the Conger undershirt there is placed "a sanitary chest protector," shown in the drawing as shield-shaped. As to the construction of this chest protector the patent says:

> "If the shirt is made of knitted fabric, the chest protector may be produced by suitable machinery simultaneously with the other portion of the shirt; but, if the shirt is made of flannel, the chest protector *e* will be sewed permanently upon the *interior* of the front."

Manifestly, the Conger patent has not the remotest relation to the invention in controversy. It does not show or describe a shirt to be starched and laundered, but one to be made only from flannel or knitted material. The shield-shaped "protector," which *may be* but is not required to be sewed on, is placed on *inside* the shirt, so that in no sense can it be called a shirt "bosom;" nor is there the slightest suggestion of any binding to be applied to such piece, or of reason for the use of a binding.

2. *The Marr Patent* (p. 422).

This patent, also, manifestly has to do with a shirt that is not to be laundered; therefore, it has no relation to the invention of complainants' patent, which was designed to obviate defects present in laundered or dress shirts only.

The Marr patent shows a shirt having a shield-shaped front, *buttoned* on to the bosom part of the shirt by a row of buttons on each side. Secured along the medial line of this attached piece are other pieces called "half fronts or flies," each one of which is provided with buttonholes on its outer edge, and is so shaped as to cover one-half of the shield-shaped front. It is proposed to make these various pieces of different colors; and by unbuttoning any one and folding it over along the medial line, and buttoning it on to the row of buttons on the opposite side of the front, the wearer of the shirt can at pleasure change the color of the exposed shirt front.

The patent says that "the edges of each ply and the bosom "front *may be* bound with binding;" but no special form of binding is shown or described, nor is there any reason to suppose that Marr contemplated anything more than the ordinary mode of binding the exposed edges of any article of wearing apparel, with the raw or selvedge edges of the binding exposed.

Certain it is that he could not have had in mind any of the evils which it was the object of the Cluett invention to obviate; nor were any of those evils present in the Marr shirt, which necessarily, as above indicated, was of flannel or some similar material and not laundered; and, therefore, nothing shown by Marr furnishes a remedy for such evils.

3. *The Nichols' British Patent* (p. 663).

This patent has no relation to the Cluett invention, save that it describes a mode of attaching a binding to the edge of any garment or other article which it is desired to finish up. It does undoubtedly describe the use of a narrow strip of fabric to be applied to the edge of the article or garment by two rows of stitches and in such a manner that the edge of the garment will be pocketed by the binding strip, and at the same time both edges of the binding strip itself will be turned in under the body of the strip and thus be pocketed themselves.

Thus, in 1864, ten years before Cluett made his invention, Nichols described a mode of binding, of general application to the exposed parts of garments; but he makes no suggestion of utilizing either this or any other form of binding to overcome any existing defects in dress shirts, nor would any person by reading the Nichols patent have been led to the thought that by applying such a binding to the bosom of a dress shirt, those advantages would be secured which were first revealed to the world by the Cluett patent.

4. *Detachable shirt bosoms or "dickies:"*

The evidence shows that prior to the date of Cluett's invention detachable bosoms, commonly called "dickies," made of linen and adapted to be laundered, had been bound upon their edges by a narrow folded binding strip—that is, by a narrow strip of material which not only enclosed and pocketed the edge of the dicky, but which had its own edges turned under so as to be concealed from sight. Such dickies, in fact, were made and sold to some small extent by the plaintiffs herein ; but it should be remarked that these dickies did not have smooth, plain fronts, but the fronts were filled with pleats and ruffles in such a way that any slight irregularity in tension in finishing up the dickey would not be likely to make itself manifest in the laundered article.

5. *Dress Shirts with Inserted or Attached Bosoms.*

The old methods by which, in dress goods, the bosoms of shirts had long been attached to the body, were either to turn the edge of the bosom in under and then to sew through this doubled edge directly into the body of the shirt, or, where the bosom was made up of two or more layers or plies, and the front of the shirt body was cut out to receive the bosom, to turn the edge of the plies in between the plies, and also to introduce the raw edge of the cut-out shirt body in between the plies and then to connect the bosom and the body together by a line of stitching passing through the edges of the two parts.

It was the evils or defects connected with these modes of manufacture, as more fully explained in the early part of this brief, that Robert Cluett sought to obviate by the invention covered by the patent in suit.

6. *Firemen's Shirts.*

These were *flannel* garments, reinforced or made of double thickness on the bosom part—this attached piece being sewed through its edges to the body of the garment, and the edges of this piece being left uncovered.

It thus appears that it was not new in the spring of 1874 (the established date of Cluett's invention) to make dress shirts by securing a linen bosom to the body of the shirt by a row of stitches passing through the edge of the bosom. Also, it is admitted, it was matter of common experience to apply narrow bindings in various ways—in fact, to apply "folded bindings," that is, bindings with their edges turned in under the body of the binding—to the edges of various parts of different articles of wearing apparel, to conceal the raw edges from sight and protect them from being frayed out. Moreover, as in the case of the Marr shirt, the free edges of "flies" designed to be buttoned on to the shirt front had had their edges finished up (potentially, at least—as suggested in the Marr patent) by some sort of binding. Dickies, also, had been made whose edges had been provided with a folded binding. Firemen's shirts, also, had been made of flannel, on the bosom part of which an extra thickness, cut out shield-shaped, had been secured by sewing through its edges.

On these admitted facts the defendants contend, and the learned Judge at circuit held, that, aside from any direct anticipation—and, therefore, admitting *actual* novelty—there was no "*patentable* novelty" or "invention" in combining the bosom and the body of a dress shirt into an integral article of

manufacture by means of a "folded binding" applied in the manner set forth in the patent in suit.

This is claimed by complainants to be substantial error, and they believe that the Court below, in making such ruling, must have overlooked the grave defects that had long existed in the manufacture of dress shirts prior to 1874, and which were in such large measure overcome by the Cluett invention.

The learned Judge at circuit, in predicating non-patentability of the Cluett invention, seems to rely mainly upon two purely hypothetical cases. He presents the hypothesis of "a mother, " in 1870, whose son exhibited an aversion to wearing the bound " dicky." He then assumes this indulgent mother to have sewed the dicky to the front of the shirt worn by the young man, by passing a line of stitching through the binding; and then inquires whether this would have involved invention.

Under a second and very similar hypothesis he puts two "intelligent workmen" into the plaintiff's factory in 1872, one wearing a bound dicky, and the other a woolen shirt having a shield-shaped bosom sewed on to its front. He then assumes that the tab which holds in place the dicky of the one workman breaks, and that the owner, "*after examining the* " *woolen shirt of his companion*," proceeds to secure his disabled dicky to the body of the shirt "by a line of stitches " through the binding." Then again follows the question whether that would have constituted invention.

His Honor assumes, further, that in each of these hypothetical cases there would have resulted the exact invention dis-

closed in the plaintiff's patent; and his conclusion is that the inventive faculty would not have been brought into action.

The plain answer to this view of the matter seems manifold.

First. The cases put by the learned Judge are purely hypothetical. Although serious defects in the manufacture of dress shirts had long existed, no person had been sagacious enough to devise a remedy until Cluett gave the matter intelligent study in 1873 and 1874.

It is of course *conceivable* that the good mother of 1870, instead of administering condign punishment to her rebellious son who refused to wear the garment she had provided, would have yielded to his whim and made for him the new garment suggested by the Court; but it is not shown that any mother ever did this, nor is there shown even a *probability* that she would have so acted under the assumed circumstances.

So, also, it is *conceivable* that a workman in Cluetts' factory in 1872, if the tab on the upper end of his dicky had broken, would, "*after examining the woolen shirt of his companion*," have come to the conclusion that he would better secure his dicky to the shirt body by a line of stitches passing through the entire length of binding, even though no dicky had previously been so secured; but it is not shown that in fact such an idea ever entered the mind of any workman before Cluett's invention was made, and, it is respectfully submitted, it is wholly improbable that, under the assumed circumstances, this hypothetical workman would have adopted such a course. The chances are a thousand to one that he would have discarded the dicky alto-

gether, or else would have mended or replaced the broken tab.

Even if the "mother, in 1870," or the "intelligent workman, in 1872" had concluded to attach the dicky to the shirt front by means of stitching, there is no reason to suppose that they would have done it by a continuous line of stitching running along the entire length of the binding. The connection might have been made by a few strong stitches at each of the upper corners and at the lowermost point of the dicky; or by passing a line of stitches from the two upper corners *part way only* down each side of the dicky, thus, in each case, securing the dicky firmly to the shirt body, but at the same time leaving it free to move through a portion of its outline relatively to the shirt body. This was regarded by some as a desirable mode of attaching bosoms to shirt bodies, as will appear by reference to the Jenks patent of 1873 (p. 424) and the Thomas patent of 1873 (p. 426).

Second. Suppose that this imaginary mother of 1870 (and the same would be true of the supposed "intelligent workman" of 1872) had actually, under the circumstances stated in the opinion of the Court below, sewed the bound dicky upon the shirt front; would this have been a making of the invention set forth in the Cluett patent? If done, would it have given to the world knowledge of the fact, first actually communicated by the Cluett patent, that the existing defects in dress shirts could be obviated in this way? What knowledge would that mother or that workman have derived as to the utilities effected by that mode of manufacturing shirts?

In this connection a most pertinent inquiry would be this: What would that same mother be likely to have done after the new shirt which she had made for her son (by sewing a bound dicky on to the shirt front) had worn out? If, in the year

1873, that same mother had been called upon to make a new shirt for her son, and to attach a fine linen bosom to the shirt body, is it at all probable that her exceptional experience in 1870 would have led her in 1873 to bind the edges of the bosom with a "folded binding" in the manner set forth in Cluett's patent of 1874, before sewing such bosom on to the shirt? Is it not far more likely that in making such new shirt in 1873, she would have attached the bosom in the only way then known among the manufacturers of this class of goods, viz., by turning under the edges of the bosom, without the use of a binding, and then passing the stitches through such doubled edge? Would she have discovered any advantage in the use of the binding, either in facilitating the manufacture of the shirt or by way of giving greater regularity and evenness to the fabric when completed? On the contrary, is it not almost certain that she would have regarded the binding as a mere waste of material when the bosom was to be permanently attached to the body?

So, also, it goes almost without the saying that, under the circumstances stated by the Court below, the fictitious "workman in 1872" would have no mental apprehension of the idea which underlies the Cluett invention.

On this point the words of Prof. Robinson, in his excellent work on patents, are pertinent. He says (Sec. 79):

> "No exercise of the faculties can form a part of the "inventive act unless the idea resulting from such exer- "cise is fully apprehended by the mind of the inventor. "To create by accident, without a recognition of the fact "or note of his own creation, and consequently without "the power to repeat the same creative act, is not in- "vention. While previous intention to create in this "especial form, or even to create at all, is not required, it "is essential to the inventive act that the inventor should "not only *conceive*, but should also *perceive* his original "idea, and should do both so clearly as to make this idea "an actual addition to his fund of knowledge, and be able "to communicate it to the public."

Third. The various cases cited by the Judge at circuit, and upon which he seems to have relied in support of his conclusion of non-patentability, are, on examination, not found to be pertinent.

In the leading case of *Pennsylvania Railway Co. vs. Locomotive Truck Co.*, 110 U. S., 490, the patent was defeated upon the ground of mere *double use* of the invention. A swiveling truck which had previously been used under cars, was put under the forward end of a locomotive. In this new position it worked in the same way as before, was used for the same purpose, and accomplished the same result. The Court, with citation of many authorities, held that in this double use there was no invention. The Court said:

> "It is settled by many decisions of this Court * * * that the "application of an old process or machine to a similar or analogous "subject, with no change in the manner of application, and no results "substantially distinct in its use, will not sustain a patent."

In *Stimpson vs. Woodman*, 10 Wall., 117, the patent involved was for a machine for pebbling leather. Previously, in the finishing of leather, machines had been used in which a regulated pressure was applied to the surface of the skin by means of a roller with a smooth face; also the surface of leather had been finished by the used of *hand* rollers having a grained or pebbled surface. The patent covered, substantially, the use of a *machine* provided with a roller having a *pebbled* surface.

This was regarded by the Court as a mere double use of an old device, not involving invention.

In *Gardner vs. Herz*, 118 U. S., 180, the patent seems to have been held invalid on similar grounds. The patent involved was for an improved chair seat, made of a wood fabric, consisting of two or more layers of perforated wood veneers, arranged with the grains of the different layers lying crosswise of each other.

As this material was old, and as it was used in the chair

seat in the same way in which wood had previously been used, the Court evidently regarded this new use of a perforated veneer as a mere double use. The Court said:

> "A patent cannot be taken out for an article old in purpose and "shape and mode of use, when made for the first time out of an exist- "ing material, and with accompaniments before applied to such "an article, merely because the idea has occurred that it would be a "good thing to make the article out of that particular old material."

In *Phillips vs. Detroit*, 111 U. S., 604, the patent related to a pavement consisting of wood blocks set on end upon a gravel bed, the blocks being left in the natural form of the log from which they were cut, and the interstices being filled in with gravel. The Court said:

> "The improvement described in the applicant's patent consists "* * * in simply taking a material well known and long used in "the making of pavements, to wit, wooden blocks set vertically, and "with them constructing a pavement in a method well known and "long used. It is plain, therefore, that the improvement described "in the patent was within the mental reach of any one skilled in the "art to which the patent relates, and did not require invention to "make it, but only the use of ordinary judgment and mechanical "skill."

In *Estey* vs. *Burdett*, 109 U. S., 633, one claim of the patent related to the size of the valve opening in the organ. The Court considered this a mere matter of degree, and, therefore, not patentable. The Court said:

> "The dimensions of the valve opening and of the valve are regu- "lated by the judgment of the manufacturer, as to the quantity of air "necessary and the resistance to be overcome in working the valve, "and the inconvenience in the leakage of the air."

So in *Pumice Holder Co. vs. Ferguson*, 119 U. S., 335, the Court regarded the relative size of two parts of the patented machine to be a mere matter of degree, and, therefore, because within the ordinary skill and judgment of the mechanic, not patentable.

The only novelty which the Court found in the patented

press was that the rack holding the pumice was made somewhat larger than the guide frame. The Court said :

> " There is no invention in making the guide frame and the rack of " the desired size. It required only ordinary skill and judgment."

In *Yale Lock Co. vs. Greenleaf*, 117 U. S., 554, the only difference (as regards matter pertinent to the present case) which the Court found between the patented lock and the old locks, was the change of shape in the irregular aperture of the wheels through which the key was thrust, to conform to the shape and size of the key to be inserted. As to this the Court said that it " would occur to the rudest and most unskillful mechanic."

In *Stevenson vs. Brooklyn Co.*, 114 U. S., 149, the Court held the patent bad as being for " a mere aggregation of separate devices " in street cars, " each performing the function for which it is adapted when used separately, and the whole contributing no new result as the product of the joint use "—being the familiar doctrine of aggregation as distinguished from patentable co-operation.

Reckendorfer vs. Faber, 92 U. S., 347 (not, however, cited by the Circuit Court in this case), is, perhaps, to be regarded as the leading case on this doctrine of aggregation. The Court held that there was no invention involved in merely associating a lead for marking and a rubber for erasing pencil marks, upon the opposite ends of a pencil handle or holder. The language of the Court was :

> " The law requires more than a mere change of form or juxtaposi- " tion of parts, or the external arrangement of things, or of the order " in which they are used, to give patentability."

In *Hollister vs. Benedict Co.*, 113 U. S., 59, the Court held that the slight change in the patented revenue stamp, as compared with the older stamps, was the logical and almost inevitable result of the growth of and experience in the revenue sys-

tem. The Court declares it to have arisen by "immediate inference from the existing regulations," and says that it involved "only the exercise of the ordinary faculties of reasoning upon the material supplied by a special knowledge."

To the law as laid down in each and all of the foregoing cases appellants take no exception. They say, however, that the case at bar is unlike any of the cases cited.

The changes which Cluett made in dress shirts regarded as an article of manufacture, are not referable to the head of "double use," or of "degree," or of "aggregation," or of "change of form," or of mere "ordinary judgment."

Cluett made use of an old device, it is true, to wit, a "folded binding;" *but he used it in new relations, and for new purposes, and with the achievement of a new and valuable result.* He employed this old device, a "folded binding," as the means of combining a shirt bosom with a shirt body. He did this with the intelligent purpose of thereby obviating defects which had long existed in the manufacture of dress goods of this class, and which the inventive faculty of the art seemed unable to overcome. The result was a greatly improved article of manufacture, and one which speedily obtained wide popularity.

Fourth. It is a recognized argument in support of the patentability of a new thing done that it works an improvement in the art—that there were long-existing defects in the art which are overcome by the new thing done.

On this point Cluett's own testimony (pp. 86–87) seems directly in point (italics ours):

"In the spring or early summer of 1874, *after numerous experiments*, I produced a shirt, the bosom of which was attached by a *folded binding* to the outer edges, the object of this improvement being to obtain a uniform seam or finish entirely around the bosom from yoke to yoke.

"*By this means the appearance of the bosom was greatly improved, both in its outline and by the doing away of wrinkles or creases, which were very common in bosoms made in the old manner.*

"*The binding also produced a heavy welt on the outer edge of the bosom, which added strength to the bosom and prevented its wrinkling by the motions of the arms or body.*

"*This binding, pocketing or covering the various raw edges of the bosom and the shirt, where attached to the bosom, prevented the fraying out of loose threads and the consequent disfigurement of the outer surface of the bosom.*

"Not only was the appearance of the shirt greatly enhanced, *but the durability of the garment was also materially increased.* The binding, forming a heavy welt or ridge, prevented the cutting of the body of the shirt near sides of the bosom, a common occurrence in the old style of shirt. In the old style of shirt the thin edges of the bosom tended to cut the body of the shirt at the sides of the bosom, by the constant friction of these parts occasioned by the motion of the body.

"*I found that the bound-bosom shirt could be produced with greater facility than where the bosom was made in the old manner.* Under the old plan the outer edges of the bosom of the upper and under ply were folded up to the interlining or middle ply, or to a line nearly corresponding to the same. A line of stitching was then put through these plies and the bosom was then ready for insertion into the shirt. The folding and stitching above alluded to extended down the sides of the bosom only. The bottom of the bosom was cut straight or square, and the raw edges of the same were covered by a folded piece of linen or other material, this folded piece being so stitched to the bottom of the bosom that it covered the raw edges of the bosom at that point, also those of the shirt and the tab, which was placed under the lower part of this strap or folded piece of material already described. It was not an unusual thing for this strap to wear out and expose the upper portion of the tab which it was intended to cover. It was also a common thing for this strap to break away from the bosom or from the tab, as the strap was only secured to these parts by a single line of stitching, and consisted of but one ply of material. The preparation of these various parts which I have described and attaching the same to the shirt was rather a difficult and slow process.

"The binding of the bosom dispensing with the strap and embracing the edges of the shirt and of the tab when completed was found to be not only a saving of time but also of material. In the bound-bosom shirt the folding in of the outer edges of the bosom was

dispensed with, and this accomplished two important results: *First*, the outer edges of the bosom being uniform and being bound in this condition rendered the fulling up of any one of the plies or wrinkling of the same much less likely while the bosom was being made; *second*, less material was required in cutting the three plies, as there was no folding in of the outer edges required.

"Where the bosom was inserted into the shirt under the old method already described, the body of the shirt, or that portion which had been cut to correspond with the shape of the bosom, was inserted into the sides of the bosom between the folded parts already mentioned and secured by a single line of stitching. The fact that the sides of the bosom were attached to the shirt by a single line of stitching rendered that portion of the shirt somewhat insecure, as the shirt frequently broke away from the stitching above alluded to."

Fifth. Another argument in support of the patentability of the improvement made in the art by Mr. Cluett, is found in the fact that this improvement was with him the result of careful and prolonged study and experiment. He says, on page 86, that he produced his improved shirt in the spring or early summer of 1874, "after numerous experiments."

It also appears in the testimony (pp. 37 and 220) that, in his endeavors to overcome the defects in dress shirts, he made other inventions before he hit upon that covered by the patent in suit.

Sixth. Another argument in support of the patentability of the improvement made by Cluett is found in the fact that, notwithstanding the favor with which the invention was received by the public, yet for some eight years after the patent issued, and down to the time when the infringement now complained of began, there was practically a public acquiescence.

Although the plaintiffs pushed their bound-bosom shirts vigorously and advertised it widely from the very day of the patent, Mr. Cluett testifies that he was not aware of any infringements prior to the year 1882 (p. 36). Meanwhile, however, a license had been granted to a large house in Troy—Herrman, Aukam & Co.; Rothschild Bros. & Gutman of New York City

had applied for a license but had been refused on the ground of the existing license to Herrmann, Aukam & Co.; and other large manufacturers in New York and Boston had acknowledged the plaintiff's rights under the patent (pp. 37-38).

Seventh. An examination of the record shows that after the grant of the patent in question, various other patents issued for modified forms of applying the generic idea embodied in plaintiffs' patent. Among these may be mentioned the patents of *Wm. L. Hall*, No. 276,809, May 1, 1883; No. 308,607, December 21, 1884 (pp. 444-448); No. 331,786, December 8, 1885 (p. 459); No. 336,106, February 16, 1886 (p. 462); *G. W. Pine*, No. 313,520 of March 10, 1885 (p. 450); *Max Herrman*, No. 319,487, June 8, 1885 (p. 453); No. 322,717, July 21, 1885 (p. 455); No. 322,718, July 21, 1885 (p. 457); No. 332,799, December 22, 1885 (p. 460).

It is respectfully submitted, therefore, that the work done by Cluett bears all the indicia of invention. It was the result of study and investigation on his part, directed to the ascertainment of the cause of the existing recognized defects in dress shirts and the devising of a remedy therefor. This involved the creative faculties, and not the mere exercise of good judgment or mechanical skill. The patentee seems clearly within the rule laid down by Robinson (Sec. 78 of his work on Patents):

> "The mental faculties employed in the inventive act are "the *creative* not the *imitative* faculties. *An invention is* "*the product of original thought. It involves the sponta-* "*neous conception of some idea not previously present in* "*the mind of the inventor.* Industry in exploring the dis- "coveries and acquiring the ideas of others; wise judgment "in selecting and combining them; mechanical skill in "applying them to practical results—none of these are "creation, none of these enter into the inventive act. Only "when the mind of the inventor originates an idea new to

> " himself, if not to all the world, does he call into exercise
> " his own inventive skill and perform the mental portion
> " of the inventive act."

Never before had it in fact occurred to any one that by the use of a " folded binding " the irregularities before existing in the bosoms of dress shirts, arising both from the loose threads working in between the plies of the bosom and from the inequality of strain put upon the different parts of a shirt bosom by the old methods of attaching a bosom to the shirt body, could be effectually overcome; nor can it be presumed that the hypothetical " mother in 1870," or the hypothetical " intelligent workman in 1872," existing in the imagination of the Court below, even if under the conditions of the hypothesis that created them they had sewed a bound dicky on to a shirt front, would have discovered that that temporary and exceptional expedient had opened up a remedy for the evils that had long perplexed the trade.

Another test of the presence of that quality which the law calls " invention," is laid down by Walker, in Section 40 of his excellent work on Patents, second edition, in these words:

> " When the other facts in a case leave the question of
> " invention in doubt, the fact that the device has gone into
> " general use, and has displaced other devices which had
> " previously been employed for analogous uses, is suffi-
> " cient to turn the scale in favor of the existence of inven-
> " tion."

This statement of the doctrine is quoted almost literally from the decision of the Supreme Court in *Smith vs. Dental Vulcanite Co.*, 93 U. S., 486, and seems specially applicable to the case at bar.

Eighth. Not to multiply citations of authorities, a case which seems to be specially germane to that at bar is that of *Straus vs. King*, 18 Blatch., 88, decided by his Honor, Justice BLATCHFORD, at the circuit.

The invention consisted in "the employment of a metal rivet or eyelet at each edge of the pocket opening [in pantaloons, &c.] to prevent the ripping of the seam at those points" —the rivet being so fastened in the seam as to bind together the two parts of cloth forming the seam, thus preventing the strain from acting upon the thread with which the seam was sewed.

The case was a notable one. The patent was assailed with great vigor on the ground of the alleged want of patentable novelty, the claim being made that the invention was nothing more than the employment, at the corners of a pocket opening, of an old and well-known rivet which had previously been used for strengthening seams at other points, and which in its new position performed no new function. It was also urged that the use of the rivet, in addition to the thread, for the purpose of giving greater strength to the seam, did not constitute a veritable combination, but only an aggregation. The Court, however, dismissed these defenses as without merit, and sustained the patent.

Ninth. It may not be out of place to suggest that the invention to which plaintiffs' patent relates is not to be held as devoid of patentable merit because, forsooth, it has not worked a *revolution* in the art.

It should be remembered that the human mind has been engaged with the subject of clothing and its modifications from the time when Adam and Eve were in the Garden of Eden; and it is not to be expected that in this field of invention any single improvement will produce any very radical changes in

the art. Generally, perhaps, it may be stated that inventions in clothing may be expected to involve only slight changes, but changes nevertheless requiring careful thought in their production and almost as careful thought for their recognition and appreciation.

An examination of the various patents included in the present record, of date subsequent to the Cluett patent in suit, shows that changes much smaller and less important than those described in the Cluett patent have been deemed by the Patent Office worthy of protection. It can hardly lie in the mouths of the defendants (see the various patents granted to Hermann, one of the defendants) to criticise the Cluett patent on the ground that it deals with the details of construction of an article of clothing.

It will hardly be contended by the defendants that the manufacture of fine shirts prior to 1874 was not attended with the various difficulties hereinbefore enumerated and specially set forth by Mr. Cluett on pages 6 and 7 of the record; nor will they be likely to contend, in the face of the large popularity which the "bound-bosom shirt" has attained, that the use of the "folded binding" as a means of uniting the bosom to the body has not wrought a substantial improvement in the art.

In the large shirt factories, prior to Cluett's invention, manufacturers of fine shirts, in order to secure acceptable work, had to employ women of superior intellectual qualities and manipulative skill; and the difficulties attending the manufacture of fine shirts by the old methods were greatly increased when the *shield-shaped* form of bosom, and other forms with curved outlines, were substituted for the original square-shaped bosom. One of the difficulties was to get the bottom centre of the shield-shaped bosom located directly under the buttonhole of the collar stud; and the bottom of the bosom was liable to be drawn to the one side or the other by the action of the sewing machine in the insertion of the bosom in the shirt. This difficulty being substantially

overcome by the introduction of the bound-bosom principle, it became possible to use a much more common class of workwomen for making even the finest grade of goods, and thus not only was the quality of the goods improved, but the cost of manufacture could be cheapened. It became possible also to substitute machines for doing much of the work which, under the old plans, could only be done satisfactorily by hand.

Tenth. Nor is any argument in support of the contention of non-patentability to be derived from the fact that, *after the event*, the improvement made by Cluett in the manufacture of shirts—whether to a judge on the bench or to a person skilled in the art is immaterial—seems a very simple thing to have done.

The fact is that the Cluett improvement was not an obvious thing, and cannot properly be called a simple thing. Such a thing had been needed for years; various things had been tried by those skilled in the art to overcome existing difficulties; when at last this was hit upon, it was recognized at once as a long-needed improvement. This final success was not the logical outcome of the prior state of the art; it did not follow, as a matter of course, from what had gone before; it was the fruitage of a careful and intelligent study of the whole subject to which it related.

Not to refer in this connection to the oft-repeated apochryphal story of Columbus and the egg, reference may be made to the history of the introduction of anthracite coal as a fuel, to show how a thing seemingly the most simple and obvious to one's present experience, may have required long years of study and experiment to accomplish in the first instance. The

story is graphically told in Vol. 15 of "Harper's Magazine," p. 451 (1857).

Col. Shoemacher barely escaped mob violence because of the repeated failures of his friends and acquaintances, to whom small lots of the coal had been sold, to make the "black stones" burn. Their threatening indignation was dissipated at last only when, by a mere accident at the Fairmount Nail Works, it was discovered that to secure good combustion with the hard coal it must be treated in a manner materially different from wood and bituminous coal and the other fuels then known to the art. Once ignited, it should be let alone, instead of being raked and stirred and blowed.

The burning of anthracite coal seems a very simple thing now, but it was effected originally only by long study and many fruitless experiments on the part of skilled and practical artisans.

Conclusion.

From the foregoing it abundantly appears:

1. That under the proper construction of the Cluett Patent No. 156,880 all three of defendants' shirts are infringements.

2. That the only alleged prior use which the Court below considered as even approximately established—that at Chatham, N. Y.—cannot be held to affect the patent;
   (a) Because the Chatham shirts do not contain the patented invention; and
   (b) Because the dates of the manufacture of these

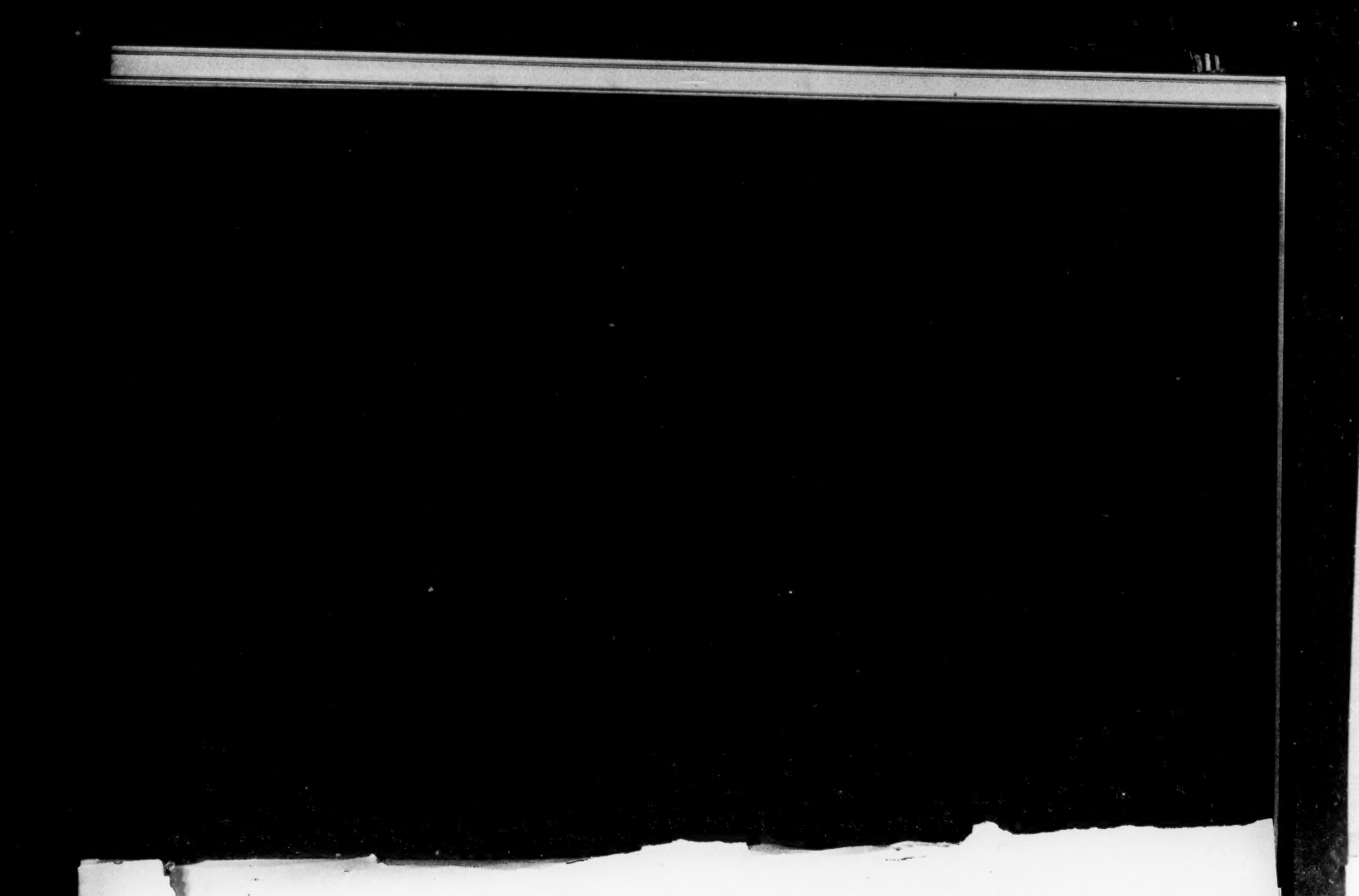
shirts are not satisfactorily established as prior to Cluett's invention; the burden of proof in this regard being on the appellees.

3. The new features of shirt construction set forth in the Cluett patent, as compared with the various things in the prior state of the art, constitute a veritable invention.

The Cluett invention effected a marked improvement in the art; it overcame recognized and long existing defects; it was the result of experiment and study, and not come at logically and as a matter of course in the regular and inevitable development of the art. It is not a case of double use, nor of aggregation. In short, the Cluett improvement exhibits all the indicia of invention as distinguished from mechanical skill.

The judgment below should be set aside, and the cause remanded with instructions to enter a decree for the plaintiffs.

S. A. Duncan,
J. A. Skilton,
Of Counsel for Appellants.



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JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 174.

GEORGE B. CLUETT AND OTHERS,
Appellants,
vs.
HORACE B. CLAFLIN AND OTHERS,
Appellees.
IN EQUITY.

BRIEF FOR APPELLANTS.

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SUPREME COURT OF THE UNITED STATES.

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GEORGE B. CLUETT and others, Appellants,	
vs.	In Equity.
HORACE B. CLAFLIN and others, Appellees.	

Brief for Appellants.

This is a suit in equity, originating in the Circuit Court of the United States for the Southern District of New York.

The parties to the suit are as follows:

Plaintiffs: George B. Cluett, J. W. A. Cluett and Robert Cluett, constituting the firm of George B. Cluett, Brothers & Co.

Defendants: Horace B. Claflin, John Claflin, Edward E. Eames, William S. Dunn, D. N. Force, H. J. Fairchild and Daniel Robinson, composing the firm of H. B. Claflin & Co.; and Solomon Tim, Louis Tim, Maurice Ober, J. O'Sullivan, Edward Wallerstein and Max Herman, composing the firm of Tim, Wallerstein & Co.

The bill of complaint is brought upon Letters Patent of the United States No. 156,880 for an "IMPROVEMENT IN SHIRTS" granted to Robert Cluett November 17, 1874, and assigned

to the plaintiff firm June 28, 1875 (*Record*, p. 342). The bill charges infringement of the patent, and prays for profits and damages by reason thereof, and for an injunction (pp. 1–5).

The defendants duly appeared and made answer, the answer setting up three defenses:

Non-infringement;
Anticipation;
Want of patentable novelty.

The plaintiffs made reply (p. 10), and thereby issue was joined.

Proofs were taken, and upon the final hearing, on the pleadings and proofs, the cause was decided against the plaintiffs; and on June 9, 1887, a decree was entered dismissing the bill with costs to the defendants (p. 672).

From this decree the present appeal is taken.

The opinion of the Court below, upon which the decree was based, is found on pages 669–671 of the record.

This opinion sets forth the *object* of the patented invention, with statement of the *nature* of the same and quotation of the *claims*, and then proceeds to a discussion of the various defenses.

As regards the defense of *prior invention*, the opinion dismisses as not worthy of serious consideration all the testimony offered in support of the allegations of prior use or invention, except that relating to an alleged prior use at Chatham, New York. As to this particular use, the Court, although judiciously declining to make it conclusive against the patent, in the presence of what it deems a superior defense, plainly intimates that if there were no other defense it would deem the use at Chatham to be fully established and to be an anticipation.

The defense which the Court does hold conclusive is that of "want of patentable novelty," in view of the established state of the art.

Assignment of Errors.

The appellants respectfully submit that the Court below is in error upon two points:

1. In finding upon the evidence that "it can hardly be said that there is a reasonable doubt remaining regarding this Chatham anticipation" (p. 670).
2. In ruling that, even if the constructions covered by the claims of the patent are not directly anticipated, "the patent must be declared invalid for want of patentable novelty" (p. 670).

It is for the purpose of securing a reversal of judgment upon the questions presented by these two assignments of error that the present appeal is taken and prosecuted.

As to the *Chatham shirt* (illustrated by Exhibit A), the appellants contend, *first*, that under any tenable construction of the claims it does not embody the invention of the patent; *secondly*, that the testimony regarding its manufacture is too untrustworthy and uncertain to justify a finding that the shirt was made at an earlier date than the Cluett invention.

As regards the defense of *non-invention*, the appellants contend that the patented invention is not only essentially different from any one specific thing existing in the earlier art, but is not the logical outgrowth of all or any number of the prior constructions considered in gross—in other words, that, notwithstanding all that is shown to have had an earlier existence, the production of the patented article required the exercise of that degree of ingenuity and of those indefinable mental processes to which the law attaches the term "invention."

This latter contention of appellants derives large support—

(1) From the action of the Patent Office in granting the patent after fully considering those things, or at least some of those things, which seem to have had the most weight in influencing the Court against the patent.

(2) From the manifold advantages which the patented construction has over the earlier ones.

(3) From the large favor with which the new construction was received by the public.

(4) From the wide public acquiescence accorded to the patent for years after its issue.

(5) From the various earlier attempts to obviate the difficulties which were first successfully overcome by this invention.

(6) From the large number of patents which have since appeared for modifications of the fundamental invention embodied in the patent in suit; several of which later patents have been taken out by some of the very persons who are here defendants, and some of them also by this inventor, Robert Cluett, himself.

The accompanying sheets of sketches are intended to illustrate, on an exaggerated scale for greater distinctness, the construction of the Cluett shirt, the alleged infringements, and the various typical things in the prior state of the art—as well as the alleged Chatham anticipation, Exhibit A.

Nature of the Patented Invention.

The invention is styled in the patent an "*Improvement in Shirts.*"

This improvement relates to that class of shirts in which there is a bosom made out of linen or similar material, adapted to be starched and ironed, and thus by laundering rendered rigid or stiff, as contradistinguished from a shirt

of cotton or woolen fabric designed to have the bosom part as well as the body left flexible and unlaundered for use.

While the patent does not state all this in direct terms, it is a plain inference from the contents of the specification, and is positively asserted by plaintiffs' expert—his statement in this regard not being questioned by the defense.

Mr. Benjamin says (p. 15):

> "I understand, further, that the invention relates to a shirt made of a material adapted to be laundered to fit it for use, that is to say, a shirt wherein the body is of muslin or similar material and in a flexible or semi-flexible condition, and wherein the bosom is of one or more layers of linen or similar material and starched, ironed, or otherwise finished to be rigid or stiff; a shirt having the features as stated, in contradistinction to a shirt made from a cotton or woolen fabric (such, for instance, as flannel or knit goods) and wherein the body and bosom of the shirt are both flexible and intended to be so in the finished shirt—that is, a shirt wherein no starch or other stiffening material is employed to put it into condition for use."

The invention has to do with the mode of preparing the bosom part and of attaching it to the body of the shirt—the claim on the part of the plaintiffs being that the resultant product is a superior article of manufacture as compared with the goods of this class produced by the modes of preparing and inserting bosoms in vogue at and prior to the date of the present invention.

By the old methods (Sheet III., *infra*), the practice was to cut the bosom out somewhat larger than it would be when finished up; and, then, if the bosom was made of a single ply or layer, to turn the raw edges in under, and, laying the bosom on the body, to attach it thereto by stitches passing through the two near the margin of the bosom, as illustrated in the Perkins patent, p. 414. In case the bosom was made up of two or more plies or layers, it was customary to turn the raw edges of each ply inwardly and between the plies, and then, if the body of

the shirt was not cut out in front, to attach the bosom to the body by laying it on the latter, and sewing through the turned-in edges and the body. If, however, the front of the body was cut out, it was customary to introduce the raw edge of the material composing the shirt body in between the turned-in edges of the two plies of the bosom, and then to connect the parts permanently by a single row of stitches.

The object in thus turning in the raw edges of the bosom was to conceal them from sight, and, so far as such result would follow therefrom, to keep them from raveling.

Such constructions, however, were found to be seriously defective, and in more ways than one.

1. While in this way the raw edges of the bosom were withdrawn from sight, they were not effectually prevented from raveling. Even though turned in between two layers of the bosom, the severe manipulation to which such articles are always and necessarily subjected in the processes of the laundry, causes these raw edges to fray, and the loose threads work in beneath the outer ply of the bosom and become clotted with starch (Benjamin, x-Q. 14, p. 22). By repeated launderings, these threads become more and more expanded in size; in the words of Mr. Benjamin (x-Q. 15, p. 22), they tend to "bunch up and absorb starch and to form rough spots, destroying the appearance and finish of the bosom"—this being, in fact, the disfigurement spoken of in the patent.

2. The bosom formed in this way, and having no other support than what was derived from the turned-in edges, was liable to rumple easily and to break with the movements of the body.

3. A special difficulty lay in the impossibility of turning the edges in evenly, and of securing the bosom to the

body without inequality of outline and tension at different points. The work had to be done by hand, and even the most skillful, and when exercising the greatest care, found it a difficult task.

The difficulty of securing uniformity in the tension of the bosom was specially manifest when the outline of the bosom was curved.

Any lack of uniformity in the tension was sure to make itself manifest when the shirt was laundered; it would then be most difficult, if not impossible, to iron the bosom evenly and smoothly. It was liable to wrinkle or pucker.

4. With a bosom formed and secured in place in this way the heaviest wear, both in use and in the laundry, would come on or near the edges; and when these were worn out the bosom, as a whole, had to be discarded, even though the other parts might be perfectly good. Also, the turned-over edge of the outer ply of the bosom, when starched and ironed, had a sharp cutting action, and was liable to cut or fray out the adjacent parts of the shirt body.

It was the object and effect of the patented invention to obviate, practically, these various defects. This desirable and highly useful result is secured by the expedient of leaving the edges of the overlying layers of the bosom perfectly flat, and then "pocketing" them by means of a binding strip of similar material, "cut from the piece" as distinguished from the use of a tape. When this binding strip is used on a bosom with a curved outline, it is to be cut "on the bias," so that it can be applied evenly and without wrinkles, and continuously to all parts of the edge.

This binding is spoken of in the patent as a "folded binding," by which it is meant (as the expert, Benjamin, fully ex-

plains on page 17), that the raw edges of the binding strip are to be folded in under the strip itself. The object of this is apparent, since manifestly it is as important to conceal the raw edges of the binding as to conceal the raw edges of the bosom itself. It would be but little gain to pocket or conceal the latter, if, in doing it, one were to expose the equally objectionable raw edges of the former. Hence, special note should be made of the qualifying word "folded," thus used to indicate the mode of pocketing the edges of the binding strip itself as illustrated in the several figures of the patent drawing.

As to the function and nature of this binding, Mr. Benjamin, p. 17, says:

> "Its office * * I understand to be the pocketing or covering of the raw edges and loose threads of the bosom or bosom and shirt body. *The binding is described as folded. This I understand to refer to the edges of the binding.*" [1]

By leaving the edges of the bosom flat, it is a perfectly easy matter to apply such a binding as this to the bosom without bringing any strain or tension on the different parts of the bosom; and, after the binding is thus secured to the bosom it is a perfectly easy matter to sew this bound bosom to the shirt body without putting any one part of the bosom under tension or strain as compared with the other part.

The net result is a shirt in which there is no liability that the bosom will be disfigured by the loose threads or raw edges of either the bosom or the binding strip; in which the whole structure is stiffened, strengthened and made more durable by the presence of a binding strip, which—especially when it has been filled with starch, which it holds like a pocket—acts

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[1] It is to be noted, also, that the limitation to a "*folded*" binding, in claim 1, was not in the claim as originally drawn, although *in the specification* the binding had been spoken of as folded; but this limitatiod was introduced into the claim by amendment—and presumably, therefore, intelligently (p. 661).

like a frame to support the bosom and give it strength; and which thus prevents its rumpling or breaking; and in which the different parts of the bosom are not wrinkled or fulled up during the making, or put under unequal strain or tension, but lie smooth and even.

Thus is fully secured the multifold object set forth in the patent, at page 341:

> "The object of my invention is, first, to avoid the folding in of the edges of the bosom, and the raw edges and loose threads thereof, which disfigure the bosom when so folded in; second, to stay the bosom, rendering it firmer in itself and less likely to rumple or break; third, to avoid wrinkling of the bosom by the unevenness or fulling up of any one of the layers composing the bosom in any part thereof."

Another valuable object, not named in the patent, is secured by this construction, as follows:

The hardest wear of a shirt bosom attached to the outer surface of the shirt body comes upon the *edge* of such bosom --this being the part most exposed to abrasion from the clothes of the wearer, and injury from hard rubbing on the washboard, and from contact with the sad-iron. If the wear at this point is taken by a mere binding strip, as soon as this is worn out it can be removed and the bosom be rebound—a manifest gain as compared with a construction where this destructive wear comes in the first instance upon the unprotected edge of the shirt bosom itself, obliging that the entire bosom be discarded as soon as the edge is worn through.

The patent is printed on pages 341-2, and again, with the drawing, on pages 407-9.

The claims are as follows:

"1. In combination with a shirt body, a shirt bosom bound on the outer edge with a folded and stitched binding, and attached to the shirt body by a separate line of stitching through such binding.

"2. The shirt bosom S, composed of two or more thicknesses of cloth, B L., bound on the outer edge with the binding B″, and secured to the shirt front F by a line of stitching O."

The differences between these claims seem to be as follows:

The first claim is broad enough to cover a bosom made of a *single* thickness of material, as well as of more thicknesses; the second claim is limited to a case in which the bosom has, at least, *two* layers or plies.

By the first claim the bosom is to be attached to the body by a "*separate*" line of stitching—*i. e.*, one separate from that which attaches the binding to the bosom—and this separate line of stitching passes "through the binding." In the second claim these conditions are not present.

In the first claim the folded binding is spoken of also as "stitched;" meaning apparently that it is secured to the bosom by stitches other than the "separate line of stitching" which attaches the bosom to the body. In the second claim the binding is spoken of simply as "binding B″;" which description is satisfied by reference to the pocketing or folding under of the raw edges of the binding, and cannot properly be held to include the mode of attaching such folded binding to the edge of the bosom by wrapping it around such edge.

Infringement.

The alleged infringements are three in number—Claflin Shirts No. 1, No. 2 and No. 3.

Claflin Shirt No. 1 :

This has a bosom which is shield-shaped in outline and made up of two plies ; the edges of the bosom are left flat, but are pocketed by an enclosing strip of linen ; the edges of the binding strip are also pocketed by being folded within the body of the binding ; one line of stitches fastens this folded binding strip to the edge of the bosom ; and another line of stitches, passing through the outer edge of this binding, fastens the bosom to the shirt body.

Plainly, this form of defendants' shirt infringes both of the claims of the patent.

Claflin Shirt No. 2 :

In this shirt the bosom is shield-shaped and made up of two plies or thicknesses ; the flat edges are pocketed by a binding strip, which is attached to the edges by a special line of stitches ; and both edges of this strip are folded in under so as to be effectually pocketed. The only difference between this shirt and Shirt No. 1 is that in No. 1 the bosom is attached to the body by a separate line of stitches passing *through the binding*, while in No. 2 the line of stitches which secures the bosom and the body together passes through the bosom just inside the binding.

It is respectfully submitted that the words "through the binding," in claim 1, are words of description merely and therefore negligible, and not words of limitation. If this be so, the line of stitching in Claflin Shirt No. 2, whereby the bosom is attached to the body, is the equivalent of the stitching spoken of in claim 1 as "a separate line of stitching through such

binding," so that the shirt would be an infringement of the claim. Certainly the two rows of stitches in the two cases perform the same functions.

If, however, the concluding words of claim 1 are regarded as necessary words of limitation, so that the shirt No. 2 cannot be held under this claim, it certainly is an infringement of claim 2, which, as shown above, contains no limitation as to the location of the row of stitches that secure the bosom to the body.

Claflin Shirt No. 3:

This shirt, like No. 2, is a manifest attempt to evade the patented construction, but at the same time it embodies, although by a more complicated organization and an unnecessary and wasteful consumption of material, all the advantages which attach to the patented device.

In this form of defendants' shirt the raw edges of the bosom, instead of being *enclosed* by a folded binding, are enclosed by a fold in the edge of the shirt body, where the latter has been cut out to receive the bosom; but this exposes a raw edge of the *shirt body*, and this has to be enclosed or protected by a binding strip, the edges of which are turned in under so as to be completely concealed. Two lines of stitching are used, one of which attaches one edge of the folded binding to the body of the shirt, and the other of which passes through the other edge of the binding strip, and also through the bosom and the body.

It must be conceded that this form of shirt can be held under claim 1 only upon the construction which makes the concluding words of the claim words of description merely, and not words of limitation. Thus interpreted, claim 1 would seem to be infringed.

But however it may be as to claim 1 it is confidently urged that this form infringes claim 2. The bosom is made up of two layers; through the use of a folded binding strip ("binding B″") the raw edges of the flat bosom are "pocketed," as also

are the raw edges of the binding strip itself; and the bosom is secured to the shirt front by a line of stitching, which, although not separate from, but the same as, the line which secures the binding to the bosom, is really "the line of stitching O" of claim 2, for this claim does not require the stitching which unites the bosom and the body to be separate from that which unites the bosom and the binding.

Nor does the *flat* form of the binding in shirt No. 3 relieve the shirt from the charge of infringement. Although, in this respect differing from the form of binding shown in the patent drawing, this difference is not matter of substance. The binding is still a "folded binding" (binding B″); and it is through its presence that all the advantages contemplated by the patent are secured to this form of shirt. Benjamin says, with reason, on page 18:

> "The method of associating the parts as shown in defendants' shirt now under consideration produces or makes in the finished shirt an article substantially identical with that shown and described in complainants' patent. The relation of the parts as stated is somewhat different, but the effect of the conjunction of the several parts in the completed shirt is substantially the same. The binding covers, includes and practically conceals all the raw selvedge edges and loose threads."

This third form of Claflin shirt is that which is shown and described in the Herman Patent No. 322,717 of July 21, 1885, printed at page 455 of the record. The Herman named in this patent is one of the defendants, and the patent was issued to the firm of Tim, Wallerstein & Co., all the members of which are of the number of the defendants.

An examination of this patent shows that the patentee had in mind substantially the same points as Cluett had in making the invention of the patent in suit—the object of Herman's invention, as set forth in his patent, being "to save labor and at the same time produce greater uniformity in the appearance of bosom shirts."

The Claflin Shirt No. 3 should be held an infringement.

Alleged Anticipation by Prior Use.

The attempt is made by the defendants to defeat the patent in suit by proving various prior uses.

These alleged anticipations are located in three different places—in Philadelphia, in the City of New York and in Chatham, New York.

It was only in regard to the proofs connected with the alleged prior use at Chatham that the Court below seems to have had any doubt; the proofs offered to support the other alleged uses having been dismissed by the Court as wholly unworthy of belief. On this point the Court said as follows (pages 669 and 670), italics ours :

> " A voluminous mass of testimony has been returned upon the question of prior use. The greater part, however, may be laid aside, when it is remembered that this defense must be established by proof as explicit and convincing as that required to convict a person charged with crime—proof which preponderates the complainants' testimony not only, but which *satisfies the mind beyond a reasonable doubt. The evidence upon this question is full of contradictions and improbabilities and furnishes another illustration of the difficulty of arriving at the truth from human testimony.*
>
> " *Although corruption, prejudice and self-interest may be wholly absent, it is well-nigh impossible for a witness, no matter how intelligent he may be or how retentive his memory, to recall the details of ordinary transactions occurring twelve or fifteen years before.* Even the most intelligent and incorruptible witnesses are here proved to have been mistaken in important particulars, and others, not so intelligent or virtuous, are contradicted and discredited. It is thought that the testimony falls below the standard required by the rule referred to, unless it be the proof of prior use at Chatham, New York. Two witnesses who made bound-bosom shirts similar to the patented shirt were called, and, at great length and with careful attention to details, told the manner of construction and the experiments which led to the adoption of that style of shirt.
>
> " But the character of one of these witnesses, Ford, was compromised by an attempt upon his part to sell the knowledge he possessed for a large amount of money, and the Court should hesitate to accept his story were it not corroborated by the testimony of the County Judge of Columbia County, whose character is conceded by all to be entirely beyond repoach. Judge McClellan positively and with reiteration testifies that he bought bound-bosom shirts prior to 1870, and gives facts and circumstances which render it quite improbable that he is in the wrong. To be sure, he is shown to be mistaken

as to minor details in a few instances, but upon all material questions his testimony remains entirely unshaken, and, when taken in connection with the evidence of Ford and Clark, it can hardly be said that there is a reasonable doubt remaining regarding the Chatham anticipation."

The appellants agree fully with the finding of the Court in regard to the alleged prior uses in Philadelphia and New York, but take exception to the finding of the Court in regard to the use at Chatham. Therefore, the latter only need be here considered.

The defendants seek to establish the alleged prior use at Chatham by the testimony of three witnesses—Hiram M. Ford, who had a small gents' furnishing store at Chatham from 1865 to 1880, and who, it is claimed by defendants, made the Exhibit A; Myron E. Clark, who was an employee of Ford, and who succeeded to Ford's business in 1880; and Hugh W. McClellan, who bought from Ford some of the alleged anticipating shirts.

As regards the value of this testimony appellants says:

1. The shirt made by Ford (said to have been like Defendants' Exhibit A—although this exhibit is not one of the original shirts, but was made at a date subsequent to Cluett's invention, and certainly as late as 1879, if in fact, it be not a fraudulent exhibit, made for the purposes of this suit) did not embody the invention covered by the claims of the Cluett patent. If like Exhibit A, they did not have the "folded binding," which is an essential element of the patented invention.

2. The witness Ford is shown to be utterly unreliable, his character, as the Court below found, having been "compromised by an attempt on his part to sell the knowledge he possessed for a large amount of money."

3. The witness Clark was so connected with Ford, such are the contradictions appearing in his testimony, and such

the inexactness of his statements that the gravest suspicion must attach to his evidence.

4. The testimony of Judge McClellan, while that of a man whose character is beyond reproach, is not such as to command respect. His memory is shown to be defective; his recollection of the dates at which he purchased shirts of Ford prior to 1874 (the year when Cluett made his invention) is not satisfactory; his description of the shirts purchased in those early years is most uncertain; and even though he spoke with greater exactness than he does, in his attempt to describe minute details of construction of shirts he had purchased nearly twenty years before, it is submitted that his testimony upon such a point would be utterly unreliable.

A court should hesitate long before such testimony by a single witness, no matter how respectable the man may be, is accepted, for the purpose and with the effect of overthrowing a patent that has been so largely respected by the public, and has enabled its owners to build up a large and prosperous manufacturing industry.

Considering these and the connected questions more in detail, the following facts are to be noted:

First. The defendants do not produce any shirt actually made by Ford or by Clark, or purchased and worn by McClellan, prior to 1874, the date of Cluett's invention. The claim is made that prior to that date Ford, aided by Clark, made, and that,

among others, McClellan bought of Ford, shirts *like Defendants' Exhibit A* (see Sheet II., *infra*).

The date of this Exhibit A, also known as the "Mambert shirt," is wholly uncertain. It was found in the year 1885 by Clark in a package of old shirts then in the possession of Smith & Clark (successors in business of the witness Ford), and was then purchased by Isaac H. Mambert, a drummer in the employ of Mack & Co., who are defendants against this same Cluett patent in the companion suit No. 175 of the present docket. Clark, on request, produces the bundle of shirts from which Exhibit A was taken, and testifies (x-Q. 343, x-Qs. 359–363, pp. 569–571) that of the thirteen remaining shirts five were made by himself, five by Smith & Clark, one probably by Ford prior to 1880 (the date at which Smith and Clark succeeded Ford) and the remaining two by outside parties. He thinks that the one assigned to Ford must have been made by Ford, because, he says, (x-Q. 360): "The bosom is larger than I have any re-" membrance of having made since I did the cutting, and as I " have no recollection of making it as distinct from any other." This apparently would have been as good a reason for assigning this shirt Exhibit A to "an outside party" as to Ford.

Clark's story about this shirt is that it was made by Ford, at some uncertain date prior to 1880, for a man named J. H. Mambert, who, Clark says, once gave an order for two shirts and took one of them and paid for it, but never called for the other. He assumes it to have been made for J. H. Mambert, because his name appears stamped upon the shirt with a rubber stamp; but how or when that stamp was made is not satisfactorily explained. J. H. Mambert, the farmer, being produced by the plaintiffs in rebuttal, testifies (pp. 275–6) that he did once order from Ford two shirts; that he paid for them, took them away and wore them out; and that that was the only order for shirts that he ever gave Ford. This, he thinks, was in 1877, but it might have been in 1878 or 1879.

It is submitted that the evidence does not establish that the shirt Exhibit A was ever made by Ford.

Second. An examination of the shirt Exhibit A fails to reveal the presence in it of the invention patented to Cluett. It does not contain the "folded binding" which is an essential of the invention. An examination of the exhibit shows that the under edge of the binding is not "folded." Instead of being folded upon itself so that its raw edge is pocketed, it is left flat, and thus this edge is liable to become raveled in the manipulations of the laundry, and its loose threads to work in under and disfigure the bosom. In other words, there is present in this Exhibit A one of the very defects which it was the object of the Cluett invention to overcome.

A section of this shirt, on an enlarged scale, to show the arrangement of the binding, is to be found on the sheet of sketches accompanying this brief.

Third. Then, again, aside from Exhibit A, no one of the three witnesses, Ford, Clark and McClellan, describes a shirt having a "folded binding," such as is described in the Cluett patent and such as would serve all the functions of that binding.

Fourth. Not only do the witnesses fail to produce any of the original shirts made by Ford prior to 1874, but they are wholly unable to produce any *books or memoranda* for the purpose of establishing the dates at which it is claimed they made the anticipating shirts.

Order books and books of account were kept by Ford, and some of these books were left with Smith and Clark when Ford went out of business (*Clark*, x-Qs. 166–179, 313–317, pp. 556, 567), and repeated references are made to these books by Ford and Clark, but when the books are called for they are unable to produce them (*Clark*, p. 270; *Ford*, p. 195). Ford, when pressed for the books, claims that they have been destroyed (p. 195).

Fifth. The Chatham story not only gains no strength, but it is absolutely discredited, by the character of the principal actor and witness, *Ford*, and by the glaring contradictions in his testimony.

Ford (pages 465–489) kept a gents' furnishing store at Chatham, New York, from the year 1864 to 1880, and claims to have made bound-bosom shirts like Defendants' Exhibit A continuously during all those years. In 1880 his business was sold out to Smith & Clark, and in 1882 the business passed into the hands of Clark alone.

The testimony of this witness is valueless to support the contention of the defendants.

1. As regards the character of this witness, the Court below (page 670) says as follows:

> "*The character of one of these witnesses, Ford, was compromised by an attempt on his part to sell the knowledge he possessed for a large sum of money.*"

The evidence on which the Court based this estimate of Ford's character is found largely in the testimony of the witness himself, supplemented by that of Wallerstein, one of the defendants herein, and of Mack, one of the defendants in the companion suit No. 175.

Ford admits that he met Wallerstein some three months or more before he was called to the stand, and then bargained with him that he should pay one thousand dollars provided he (Ford) could furnish evidence "sufficient to break the patent, or if a compromise was made" (x-Q. 124). For this sum he was to place "a perfect chain of evidence in the hands of defendants" (x-Q. 126). If the patent was not broken and no compromise made, the witness was to lose nothing, but was to receive "lawful expenses, subpœna fees and mileage" (x-Q. 131).

Although brought to the witness stand by a subpœna, and

apparently answering some questions with reluctance, Ford declares this bargain to be still subsisting, and that he expects "to hold the defendants to the payment of the one thousand dollars" (x-Qs. 128–130, x-Q. 141, pp. 475–6).

It also appears that in the month of August, 1885—shortly before the bargain with Wallerstein—Ford was engaged in negotiations with Mr. Mack, of the firm of Mack & Co., defendants in the suit No. 175. He told Mack that he "could help him out," but would not do so "without being compensated." When asked whether he would do it for $200, he says, "My reply was that I was no $200 man. He (Mack) then asked me what I would take. I said it was worth $1,000 or nothing" (x-Q. 149, p. 477).

On pages 665–667 appears a correspondence had between Ford and Mack & Co. on the 3d, 4th and 5th of September, 1885, in relation to this same matter, in which Ford offers "to break the patent" on the payment of one thousand dollars to his wife; said Ford "to give an affidavit in full, and to appear in Court at any time, upon payment of lawful witness fees, when called, and give testimony in full of such facts and to furnish affidavits or testimony, as may be desired, of other parties, so far as I am able, to substantiate my own."

Mack & Co., replying to this proposition, say that "the conditions are reasonable enough;" but because Mack & Co. desired a little more time "to get the desired co-operation of some others" before paying the money, this second bargain with Mack & Co. seems never to have been consummated.

So, also, Mack testifies (x-Q. 22, page 655) that Ford told him "that the patent was good for nothing, and he could break the patent; that he did not propose to give any affidavit unless he was paid for it, and he wouldn't give an affidavit as was wanted unless he was paid $1,000."

Wallerstein says (Q. 6, page 652) that Ford told him "that Mack would not get his testimony unless he would pay him."

2. For the purpose of effecting this corrupt bargain with Wallerstein and with Mack & Co., this venal witness endeavored to impress these parties with the idea that the Cluetts were endeavoring to bribe him to suppress the supposedly damaging facts that he possessed.

Wallerstein (Q. 6, page 652) says that Ford told him that "Cluetts had sent for him and offered him $800 to sell his prior right of having made this shirt, but he would not sell the right."

Mack also testifies (x-Q. 22, page 655) that Ford stated to him during their negotiations that "the Cluetts had offered him $800 to not testify in any case to what he knew regarding the manufacture of the bound-bosom shirt."

All three of the Cluetts deny most positively that they ever had any conversation with Ford on this subject (pages 160–1, 271–2, 273–4); and Ford himself (Q. 270, page 488) admits that he never had any such conversation with the Cluetts. The fact then is established that no such conversations took place; but it is equally proven that Ford told Wallerstein and told Mack that the Cluetts had tried to purchase his silence.

3. Another instance of the recklessness of this witness is found in his testimony regarding his knowledge of the Cluett patent prior to his coming upon the stand.

He had for some months been engaged in his corrupt negotiations with Wallerstein and with Mack, whereby he was to furnish them with "a perfect chain of evidence," with which "to break the Cluett patent;" and yet on the stand, on December 8, 1885 (x-Q. 218, page 484), he asserts that he never saw the Cluett patent until "a week ago to-morrow"—that is, until December 2, 1885. Such statement is absolutely inconsistent with the language of the contract which Ford sent to Mack on September 3, 1885, for Mack & Co. to sign. In this draft of contract (page 666) Ford says: "For the sum of $1,000, to my

wife Helen A. Ford in hand paid, I do hereby agree to give to Messrs. Mack & Co. all the facts in connection with my formerly manufacturing a bound-bosom shirt similar to shirt as specified and claimed in a patent issued to George B. Cluett November 17, 1874."

Again (x-Q. 48–50, page 470), he explains when and how he first heard of the Cluett patent. He says it was in 1882, when, being measured for a shirt by Garry of Troy, Garry said that he could not make for Ford such shirts as he then had on, as they were patented. Ford proceeds, "I then said, 'Give me "the date of this patent.' *He gave me the date.* * * * I "then said he [*Cluett*] could not sustain his patent." Six days after, this same veracious witness says (x-Q. 213–14, pages 483–4): "I never knew the date of the patent obtained by George B. Cluett, Bro. & Co." "x-Q. 214. Did not Mr. Garry give you the date? A. No, sir."

When asked on re-direct (Q. 247, page 486) to reconcile his statements in answer 50 with those in answer 214 he confesses himself wholly unable to do so.

Again, he asserts in x-Q. 220, page 484, that nobody except Mr. Garry had "explained the patent or the invention"—meaning the Cluett patent and invention—to him until the day when he was called as a witness, December 2, 1885. This of course is simply incredible, in view of the fact that he had for months been bargaining with Mack and with Wallerstein to furnish the evidence with which "to break the patent."

4. If anything further were needed to discredit this witness it might be found in his constant reference to his books, as if those would corroborate his statements.

In his letter to Mack of September 3 (p. 665) he tells Mack that if he will bring the thousand dollars to Chatham the next Saturday morning "all affidavits, &c., *with my old books*, can be pushed over to you," &c.

Again, in answer to Q. 24 (p. 468), he says that he made

shirts like Exhibit A for Henry R. Thomas, of Troy, "prior to 1870—*the books will show;*" and in answer to x-Qs. 174 to 196 (pp. 480-482), he makes constant reference to his books, as if they were still in existence, either in his own possession or with Smith & Clark, except some which he asserts to be in his own family in an injured condition. He, however, sturdily refuses to send for any of these books or to produce them for examination, giving as his reason (x-Q. 196, p. 482): "There is nothing contained therein appertaining to this case;" and this notwithstanding the admitted fact (x-Qs. 198-9) that when in business he was in the habit of keeping "order books" which contained "measurements" and "directions as to style of shirts or how the orders were to be made up."

Coupling his persistent refusal to even consent to the production of these books with his statement (209 x-Q., p. 483) that he is unable to "now fix the date of the manufacture of any particular lot of shirts" made by him "on which the binding was used upon the bosom for any particular person," or to "give the name of any such person," it would seem a fair inference that this witness at least believed that the books, if produced, would not corroborate his story.

It is nothing surprising then, that, when subpœnaed at a later day to produce the books, he should declare himself unable to find them. This is no more than what might be expected of such a witness.

Sixth. The testimony of the witness *Clark*, again, (while plaintiffs have no wish to impeach his honesty), is untrustworthy and inconclusive.

The substance of his testimony is that in 1868 he became an employee of Ford; that in 1869 Ford began making shirts like Exhibit A; that the manufacture of such shirts was continued by Ford in a small way down to 1880, when Ford went out of business; that he, Clark, succeeded Ford in 1880, buy-

ing out his stock and good-will and receiving his order books; that, subsequently, the firm of Smith & Clark was formed, succeeding to the same business; and that he, Clark, and the firm of Smith & Clark continued in a small way to make shirts like Exhibit A down to the time when he testified.

The following observations as to this witness are in order:

1. He nowhere describes the shirts made by Ford and by himself as an employee of Ford, prior to 1874, as having a "*folded* binding;" and, as hereinbefore explained, Exhibit A, presented as illustrating the shirts made by Ford, does not have *the folded binding* of the Cluett patent.

2. While Clark testifies (Q. 13, p. 543) that Ford began making shirts like Exhibit A in 1869, on cross-examination (x-Q. 61) he finds himself unable to give the date when this manufacture began.

It should be noted in this connection that Ford claims an earlier date for making these shirts, and thus the two witnesses are in direct conflict.

3. It appears that Clark had been carefully coached by Mambert, employee of the defendants in the Mack (or McNeany) suit No. 175, before he became a witness, and when put upon the stand he was examined by leading questions.

His deposition was taken February 16, 1886, but on September 1, 1885, Mambert, in the interest of the defendants in the Mack suit, had obtained from Clark the affidavit printed on page 664, in which Clark is made to describe the shirts made by Ford in 1869 and 1870, *in the exact language of the Cluett patent.*

Moreover, Clark admits various consultations between himself and the discredited witness Ford, before and during the taking of his deposition; and this, too, with the full understanding on Clark's part that Ford was endeavoring to defeat

the Cluett patent, and was to receive one thousand dollars in case of success (x-Qs. 92–108, x-Qs. 112, 118–121, pp. 550–2).

When Clark appears as a witness, instead of being asked to describe *from memory* shirts made by Ford, Exhibit A is put before him and his testimony is guided by its presence (12 Q., p. 542). Afterward, when asked to "describe in words the exact way in which you [he] made shirts like defendant's Exhibit A, in 1869, and in subsequent years" (23 Q., p. 543), he shows his utter unreliability. Instead of answering the question ingenuously, he says:

> "I cannot specify the shape of bosom made in 1869, nor I can't "specify the years in which the changes of shape were made in the "bosom. We bound the bosom, using a bias binding in 1869 and during "all the years subsequent. We bound the bosom with a bias binding strip "the same in result that this is. We put on the same as in Defend-"ant's Exhibit A, and the shirt in general cut, design and pattern is "the same shirt except as regards shape of bosom."

4. This witness gives no reason whatever for fixing upon the year 1869 as the date when the manufacture by Ford of shirts like Exhibit A was begun; and his untrustworthiness in regard to this date is made apparent by his testimony concerning the time when he and Ford first saw the advertisement of the Cluett bound-bosom shirt. This date he fixes *in the year 1875*, in which year he says the Cluetts had a full-page advertisement in the "Gents' [*Men's*] Furnishing Trade Review," giving a cut not only of their patented shirt, but also of their collars and cuffs. Ford was a subscriber to this trade paper, and this advertisement was discussed by Ford and Clark (Qs. 17 and 20, p. 543; x-Qs. 136 to 143, p. 553; x-Q. 302, p. 556).

Now, the fact is that No. 1 of Vol. 1 of the *Men's Furnishing Trade Review*, according to the evidence of the publishers and of the *Review* itself, was not published until February, 1878; and the first page-advertisement inserted by the Cluetts was in September, 1878; and not until December, 1879, did the Cluetts have a page advertisement containing a cut of their

shirt, accompanied by cuts of collars and cuffs (*Clucas*, pp. 326–327).*

It thus appears that Clark must have been from three to five years out of the way in fixing the date at which he and Ford first saw this conspicuous advertisement of bound-bosom shirts as made by the Cluetts, although its appearance led to a discussion between him and Ford that should have fixed the date accurately in their minds. If Clark's memory is no more exact as to the dates when he made shirts like Exhibit A for Ford, it is utterly worthless.

5. While plaintiffs do not charge that Clark expected to profit by the thousand dollars which he says (x-Q. 111, p. 551) he believed that Ford was to receive in case the Cluett patent could be defeated, it abundantly appears that he had another powerful reason for doing all that he could to aid Ford in his attack upon the patent.

He acknowledges (x-Q. 135, p. 553) that it had occurred to him that he was liable to be sued under the Cluett patent for the manufacture of the shirts which he had sold, in like manner as the Troy concerns were liable to such suit.

For the foregoing reasons it is submitted that the testimony of the witness Clark should have no weight in support of the alleged anticipation at Chatham; and very properly it was regarded by the Court below as in itself of little, if any, value.

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*No. 8, Vol. I., September, 1878, contains the first page-advertisement of the Monarch bound-bosom shirt, printed in that review. No. 1, Vol. II., February, 1879, has a cut of the shirt, but not of collars and cuffs. No. 5, Vol. II., May, 1879, has cut of a shirt, with cuffs, but no collars. No. 6, Vol. III., December, 1879, has the first full-page cut showing shirt, collars and cuffs.

Seventh. The testimony of *Judge McClellan* (whose statements seem to have impressed the Court below) is regarded as equally inconclusive with Clark's.

Judge McClellan, who undoubtedly is a man of probity, was sixty-five years of age when he was called to the stand as a witness in the year 1886. He claims to have bought of Ford, at Chatham, prior to 1870, and on two or three occasions, shirts like Exhibit A; and he even enters into details as to the special construction of the same, by which the bosoms of the shirts then bought were united to the bodies of the garments.

A critical examination of McClellan's testimony will show not only that it would be unjust to the Cluetts to make it the instrument of destroying their patent, but that it would establish a precedent that would imperil all patent property of this class.

1. It seems incredible that any person not skilled in this particular art should assume to remember, sixteen or eighteen years back, just how a particular shirt then bought by him was made. The extraordinary character of this attempted feat of memory will come home to the members of the Court if they will try to recall, as to any of the garments composing their wardrobes of twenty years ago, how the same were made as regards any of the more inconspicuous details thereof.

2. It will be noticed, however, that even this witness is very cautious at times, and is handled by his counsel with caution.

Thus, in answer 7 (p. 575) he gives his "*impression*" as to how far the stitching extended along the binding in the first shirts bought of Ford.

After giving (Q. 5, p. 574) a most general description of the shirts first bought by him of Ford, he says (Q. 9, p. 575) that all of the shirts bought prior to 1870 were "of the description I have given here, *as near as I can tell.*"

Then follows this extraordinary question and answer (Q. 10, p. 575):

> "Q. 10. Please look at Defendants' Exhibit A, and, after examining the same, tell us whether it resembles or differs, *so far as you can observe*, from the shirt made for you by Ford between 1867 and 1870, and worn by you during that time and after?
>
> "A. Yes, sir; this is just such a shirt as I have worn—just such bosom."

3. It should be kept in mind always that this witness was testifying with the shirt Exhibit A before him; but, even so, he makes very blundering work when he comes to give the details of construction of those shirts bought from Ford and which he undertakes to describe by reference to Exhibit A. He acknowledges (x-Q. 93, p. 585) that he never dissected the seams of one of the Ford shirts so as to examine its construction; also (x-Q. 103, p. 586) that he cannot say whether he ever saw a shirt made by Ford or his successors that had "a continuous binding on the sides and around the bottom of the bosom;" and, although he had examined Exhibit A before he was sworn, and although he had Exhibit A in his hand in the examination room, he acknowledges his inability to state how the seam is constructed without ripping it up (x-Q. 83, x-Q. 91, pp. 583–84).

4. It abundantly appears that before this witness was called to the stand he had been interviewed on two or three occasions by Ford and Mambert, and that in such interviews his recollection had been stimulated by the exhibition to him of a patent with drawings—undoubtedly the patent in suit (x-Qs. 108–114). Speaking of one of these interviews—probably with Mambert—he says, referring to the interviewer:

> "He said, in substance, that he had been informed that I had bought shirts of Mr. Ford several years ago; and shirts with a bosom that was bound with linen or something, and wanted to know if I had used such shirts bought of Ford; and I told him I knew Ford used to make such shirts, and he asked how long ago it was I had

seen such shirts or had such shirts of Ford, and *described how they were bound ;* and I thought a moment and I think I told—that it must have been seventeen or nineteen years ago ; a *good while ago anyway ;* I told him when.

" *He showed me a paper that had a diagram and printed form of claim for a patent in giving me a description, and to see if what I recollected at all corresponded with that.*" * * *

From this it will be seen that the memory of this witness was *educated* by the men who were working up this line of defense. It is not surprising, therefore, that when this witness comes to the stand and undertakes to testify up to the standard which his mentors have laid down, he constantly recurs to " Exhibit A " as a sufficient description of the shirts which he bought of Ford ; and for the same reason it is not surprising that he makes a sad exhibition when called upon to make description of the details of construction of those shirts.

5. This witness gives no good reason for his statement that he bought shirts like Exhibit A of Ford *prior to 1870.*

McClellan removed from Albany to Chatham in 1867 ; in February, 1870, he removed from Chatham to Hudson, returning to Chatham in May, 1872 (x-Q. 16, p. 576). He says that between 1867 and 1870 he bought all his shirts of Ford ; that after his removal to Hudson he bought his shirts of Ball & Bros. of Troy, and thinks that he continued to buy their shirts for two or three years after his return to Chatham in the spring of 1872 (x-Q. 127, p. 589) ; but he admits that after his return to Chatham he resumed his custom of trading with Ford (p. 577).

" 24 x-Q. After your return to Chatham did you resume your custom of trading with Mr. Ford?

" A. I did to a certain extent ; that is, if Mr. Ford was at that time carrying on his business there, but I did not deal so wholly with Mr. Ford.

" 25 x-Q. Did you purchase shirts from Mr. Ford after your return to Chatham or Hudson.

" A. I did either from him or Mr. Clark, in the same

establishment. I don't know who was running it then—either Ford or Clark, one of them.

"26 x-Q. When did you make the last purchase from either Ford or Clark? I mean of shirts.

"A. It is impossible for me to tell you, sir, but it is several years ago."

McCllelan testifies that he has no receipted bills of goods purchased of Ford, nor any memorandum or other form of documentary evidence whereby to establish the dates of any such purchases (x-Q. 105, p. 586); and, in the absence of such data whereby to refresh his recollection, and in view of the fact that he purchased shirts of Ford after his return to Chatham as well as before he went to Hudson, it is submitted that he may be wholly wrong in thinking that any of the shirts bought before 1870 were like Exhibit A. It is not unreasonable to suppose that McClellan is four or five years out of the way in his dates on this point, when we consider that Clark made a mistake of four or five years as to the date when he and Ford first saw Cluett's full-page advertisement.

6. There is abundant evidence in the record that McClellan's memory in regard to the matters here in controversy is anything but exact and reliable.

Thus, while he claims to have a distinct recollection in regard to shirts bought of Ford prior to 1870—as to whether they had a binding or not, his mind is an absolute blank as to this feature in regard to the shirts which he subsequently bought of Ball Brothers (x-Qs. 134 and 135, page 590).

So, also, he says that he has bought shirts of Clark since Clark has been in business alone at Chatham—that is, since 1880; but, when asked whether *such* shirts had a binding like Exhibit A, he says, "I am not sure," and when urged to give his "impression" about it he says, "Well, I haven't any impression one way or the other" (Qs. 27-30, p. 576). But immediately after (Q. 32) he says, "I think that all the shirts I ever got of Clark were, I should say, just like this Defend-

ants' Exhibit A, but I will not swear positively to that." And yet these Clark shirts were bought within five years of the time when the witness was testifying.

Then, again, the inaccuracy of this witness' recollection is shown in his conflicting accounts as to *the shape* of the bosom in the first shirts that he claims to have bought of Ford. In answer 5 (page 574) he says that in the first shirts bought of Ford the bosom came down "in a curve at the lower end;" and in x-Q. 21 (page 576) he says that *all* the shirts purchased of Ford between 1868 and 1880 were made in accordance with the description in answer 5. In answer to x-Q. 42, however (page 579), he says, speaking of the shape of the bosom in those first shirts, "I am not sure as to shape;" and in answer to x-Q. 67 (page 582), he says that he thinks "the sides of the bosom were nearer straight than in the exhibit here," Exhibit A; and in x-Q. 69–70, he says that the two sides were "quite straight" and that "there was no binding on the bottom of these shirts." Again, in answer to x-Q. 71 (page 582), speaking of these same shirts, he says: "Whether the first order had the sides of the bosom straight or were curved, as in the exhibit, I cannot say;" and in answer to x-Q. 100 (page 586), he is wholly at sea as to whether the bosoms of the first shirts bought of Ford were straight or curved, and on the next day he says (x-Q. 149), "To-day I doubt in regard to my first purchase being a straight-sided bosom."

Another instance of the unreliable character of this witness' memory is found in connection with the affidavit of Clark, printed on page 664. This affidavit was written out by Judge McClellan with his own hand and in his own office, and contains an important extract from the Cluett patent, and moreover was written out by him on the very day of his interview with Ford and Mambert with reference to his own purchase of shirts from Ford; and yet, when the Judge is questioned about the matter, he has wholly forgotten that Clark ever made such an affidavit before him; (x-Qs. 153 to 160, pp. 593–4).

It is respectfully submitted that a witness who cannot remember whether shirts bought within *five* years had a binding on the bosom, cannot be trusted in his statements as to the binding of bosoms in shirts bought *eighteen* years before; that a witness who cannot remember even the *shape* of the bosoms of shirts purchased eighteen years before, is not competent to testify as to other and more inconspicuous features of construction of those same shirts; that a witness who from day to day varies his testimony in regard to so prominent a feature as the shape of the bosom of a shirt—at one time making the sides straight and at another curved, and then professing his uncertainty in the matter—cannot be relied upon in respect to the presence of a binding upon the bosom, or the character of such binding if present, or the mode by means of which such binding if present was secured in place.

In short, it seems to the appellants that it was a grave mistake on the part of the Court below to place any reliance upon the testimony of the witness McClellan, however upright and well-intentioned the gentleman may be.

To defeat a valuable patent which has worked a valuable improvement in a great and valuable industry, upon testimony so unsubstantial, would be to establish a most dangerous precedent.

Appellants cannot see why the criticism of the Court below, upon this general class of testimony, does not apply to the deposition of Judge McClellan with the same force as to that of the witnesses produced in support of the other alleged anticipations. The Court said:

> "Although corruption, prejudice and self-interest may be wholly absent, it is well-nigh impossible for a witness, no matter how intelligent he may be or how retentive his memory, to recall the details of ordinary transactions occurring twelve or fifteen years before."

As a conclusion from all the testimony respecting the alleged prior manufacture of shirts at Chatham, appellants respectfully submit that it is grossly insufficient to establish dates that anticipate the Cluett invention (in the spring of 1874). The burden of proof is upon the defendants (the appellees); and they must make out their case beyond a reasonable doubt. This they have failed to do.

Alleged Want of Patentable Novelty.

In considering this defense careful attention must be given to the various things in the prior state of the art upon which the defendants specially rely in support of their conclusion of non-patentability, as distinguished from direct anticipation. It is believed that all these things are fairly represented by the following:

Conger Patent No. 146,656, January 20, 1874.

Marr Patent No. 134,909, January 14, 1873.

Nichol's British Patent No. 1594 of 1864.

Detached shirt bosoms or "dickies with binding around the edges."

Dress shirts with separately formed bosoms inserted or attached by turning the raw edges in or under, and then sewing through such folded edges and the shirt body, but without the use of a binding.

Firemen's shirts reinforced on the bosom.

1. *The Conger patent.*

This patent, as well as the Marr patent, was referred to by the Patent Office in connection with the grant of the patent in suit (p. 661).

This is a patent for *undershirts*, and not for dress shirts.

This undershirt is to be of *flannel or knitted goods*, and not of linen or some other material to be laundered. On the front of the Conger undershirt there is placed "a sanitary chest protector," shown in the drawing as shield-shaped. As to the construction of this chest protector the patent says :

> "If the shirt is made of knitted fabric, the chest protector may be produced by suitable machinery simultaneously with the other portion of the shirt; but, if the shirt is made of flannel, the chest protector *e* will be sewed permanently upon the *interior* of the front."

Manifestly, the Conger patent has not the remotest relation to the invention in controversy. It does not show or describe a shirt to be starched and laundered, but one to be made only from flannel or knitted material. The shield-shaped "protector," which *may be* but is not required to be sewed on, is placed on *inside* the shirt, so that in no sense can it be called a shirt "bosom;" nor is there the slightest suggestion of any binding to be applied to such piece, or of reason for the use of a binding.

2. *The Marr Patent* (p. 422).

This patent, also, manifestly has to do with a shirt that is not to be laundered; therefore, it has no relation to the invention of complainants' patent, which was designed to obviate defects present in laundered or dress shirts only.

The Marr patent shows a shirt having a shield-shaped front, *buttoned* on to the bosom part of the shirt by a row of buttons on each side. Secured along the medial line of this attached piece are other pieces called "half fronts or flies," each one of which is provided with buttonholes on its outer edge, and is so shaped as to cover one-half of the shield-shaped front. It is proposed to make these various pieces of different colors; and by unbuttoning any one and folding it over along the medial line, and buttoning it on to the row of buttons on the opposite side of the front, the wearer of the shirt can at pleasure change the color of the exposed shirt front.

The patent says that "the edges of each ply and the bosom "front *may be* bound with binding;" but no special form of binding is shown or described, nor is there any reason to suppose that Marr contemplated anything more than the ordinary mode of binding the exposed edges of any article of wearing apparel, with the raw or selvedge edges of the binding exposed.

Certain it is that he could not have had in mind any of the evils which it was the object of the Cluett invention to obviate; nor were any of those evils present in the Marr shirt, which necessarily, as above indicated, was of flannel or some similar material and not laundered; and, therefore, nothing shown by Marr furnishes a remedy for such evils.

3. *The Nichols' British Patent* (p. 663).

This patent has no relation to the Cluett invention, save that it describes a mode of attaching a binding to the edge of any garment or other article which it is desired to finish up. It does undoubtedly describe the use of a narrow strip of fabric to be applied to the edge of the article or garment by two rows of stitches and in such a manner that the edge of the garment will be pocketed by the binding strip, and at the same time both edges of the binding strip itself will be turned in under the body of the strip and thus be pocketed themselves.

Thus, in 1804, ten years before Cluett made his invention, Nichols described a mode of binding, of general application to the exposed parts of garments; but he makes no suggestion of utilizing either this or any other form of binding to overcome any existing defects in dress shirts, nor would any person by reading the Nichols patent have been led to the thought that by applying such a binding to the bosom of a dress shirt, those advantages would be secured which were first revealed to the world by the Cluett patent.

4. *Detachable shirt bosoms or "dickies:"*

The evidence shows that prior to the date of Cluett's invention detachable bosoms, commonly called "dickies," made of linen and adapted to be laundered, had been bound upon their edges by a narrow folded binding strip—that is, by a narrow strip of material which not only enclosed and pocketed the edge of the dicky, but which had its own edges turned under so as to be concealed from sight. Such dickies, in fact, were made and sold to some small extent by the plaintiffs herein; but it should be remarked that these dickies did not have smooth, plain fronts, but the fronts were filled with pleats and ruffles in such a way that any slight irregularity in tension in finishing up the dickey would not be likely to make itself manifest in the laundered article.

5. *Dress Shirts with Inserted or Attached Bosoms.*

The old methods by which, in dress goods, the bosoms of shirts had long been attached to the body, were either to turn the edge of the bosom in under and then to sew through this doubled edge directly into the body of the shirt, or, where the bosom was made up of two or more layers or plies, and the front of the shirt body was cut out to receive the bosom, to turn the edge of the plies in between the plies, and also to introduce the raw edge of the cut-out shirt body in between the plies and then to connect the bosom and the body together by a line of stitching passing through the edges of the two parts.

It was the evils or defects connected with these modes of manufacture, as more fully explained in the early part of this brief, that Robert Cluett sought to obviate by the invention covered by the patent in suit.

6. *Firemen's Shirts.*

These were *flannel* garments, reinforced or made of double thickness on the bosom part—this attached piece being sewed through its edges to the body of the garment, and the edges of this piece being left uncovered.

It thus appears that it was not new in the spring of 1874 (the established date of Cluett's invention) to make dress shirts by securing a linen bosom to the body of the shirt by a row of stitches passing through the edge of the bosom. Also, it is admitted, it was matter of common experience to apply narrow bindings in various ways—in fact, to apply "folded bindings," that is, bindings with their edges turned in under the body of the binding—to the edges of various parts of different articles of wearing apparel, to conceal the raw edges from sight and protect them from being frayed out. Moreover, as in the case of the Marr shirt, the free edges of "flies" designed to be buttoned on to the shirt front had had their edges finished up (potentially, at least—as suggested in the Marr patent) by some sort of binding. Dickies, also, had been made whose edges had been provided with a folded binding. Firemen's shirts, also, had been made of flannel, on the bosom part of which an extra thickness, cut out shield-shaped, had been secured by sewing through its edges.

On these admitted facts the defendants contend, and the learned Judge at circuit held, that, aside from any direct anticipation—and, therefore, admitting *actual* novelty—there was no "*patentable* novelty" or "invention" in combining the bosom and the body of a dress shirt into an integral article of

manufacture by means of a "folded binding" applied in the manner set forth in the patent in suit.

This is claimed by complainants to be substantial error, and they believe that the Court below, in making such ruling, must have overlooked the grave defects that had long existed in the manufacture of dress shirts prior to 1874, and which were in such large measure overcome by the Cluett invention.

The learned Judge at circuit, in predicating non-patentability of the Cluett invention, seems to rely mainly upon two purely hypothetical cases. He presents the hypothesis of "a mother, "in 1870, whose son exhibited an aversion to wearing the bound "dicky." He then assumes this indulgent mother to have sewed the dicky to the front of the shirt worn by the young man, by passing a line of stitching through the binding; and then inquires whether this would have involved invention.

Under a second and very similar hypothesis he puts two "intelligent workmen" into the plaintiff's factory in 1872, one wearing a bound dicky, and the other a woolen shirt having a shield-shaped bosom sewed on to its front. He then assumes that the tab which holds in place the dicky of the one workman breaks, and that the owner, "*after examining the* "*woolen shirt of his companion,*" proceeds to secure his disabled dicky to the body of the shirt "by a line of stitches "through the binding." Then again follows the question whether that would have constituted invention.

His Honor assumes, further, that in each of these hypothetical cases there would have resulted the exact invention dis-

closed in the plaintiff's patent; and his conclusion is that the inventive faculty would not have been brought into action.

The plain answer to this view of the matter seems manifold.

First. The cases put by the learned Judge are purely hypothetical. Although serious defects in the manufacture of dress shirts had long existed, no person had been sagacious enough to devise a remedy until Cluett gave the matter intelligent study in 1873 and 1874.

It is of course *conceivable* that the good mother of 1870, instead of administering condign punishment to her rebellious son who refused to wear the garment she had provided, would have yielded to his whim and made for him the new garment suggested by the Court; but it is not shown that any mother ever did this, nor is there shown even a *probability* that she would have so acted under the assumed circumstances.

So, also, it is *conceivable* that a workman in Cluetts' factory in 1872, if the tab on the upper end of his dicky had broken, would, "*after examining the woolen shirt of his companion,*" have come to the conclusion that he would better secure his dicky to the shirt body by a line of stitches passing through the entire length of binding, even though no dicky had previously been so secured; but it is not shown that in fact such an idea ever entered the mind of any workman before Cluett's invention was made, and, it is respectfully submitted, it is wholly improbable that, under the assumed circumstances, this hypothetical workman would have adopted such a course. The chances are a thousand to one that he would have discarded the dicky alto-

gether, or else would have mended or replaced the broken tab.

Even if the "mother, in 1870," or the "intelligent workman, in 1872" had concluded to attach the dicky to the shirt front by means of stitching, there is no reason to suppose that they would have done it by a continuous line of stitching running along the entire length of the binding. The connection might have been made by a few strong stitches at each of the upper corners and at the lowermost point of the dicky; or by passing a line of stitches from the two upper corners *part way only* down each side of the dicky, thus, in each case, securing the dicky firmly to the shirt body, but at the same time leaving it free to move through a portion of its outline relatively to the shirt body. This was regarded by some as a desirable mode of attaching bosoms to shirt bodies, as will appear by reference to the Jenks patent of 1873 (p. 424) and the Thomas patent of 1873 (p. 426).

Second. Suppose that this imaginary mother of 1870 (and the same would be true of the supposed "intelligent workman" of 1872) had actually, under the circumstances stated in the opinion of the Court below, sewed the bound dicky upon the shirt front; would this have been a making of the invention set forth in the Cluett patent? If done, would it have given to the world knowledge of the fact, first actually communicated by the Cluett patent, that the existing defects in dress shirts could be obviated in this way? What knowledge would that mother or that workman have derived as to the utilities effected by that mode of manufacturing shirts?

In this connection a most pertinent inquiry would be this: What would that same mother be likely to have done after the new shirt which she had made for her son (by sewing a bound dicky on to the shirt front) had worn out? If, in the year

1873, that same mother had been called upon to make a new shirt for her son, and to attach a fine linen bosom to the shirt body, is it at all probable that her exceptional experience in 1870 would have led her in 1873 to bind the edges of the bosom with a "folded binding" in the manner set forth in Cluett's patent of 1874, before sewing such bosom on to the shirt? Is it not far more likely that in making such new shirt in 1873, she would have attached the bosom in the only way then known among the manufacturers of this class of goods, viz., by turning under the edges of the bosom, without the use of a binding, and then passing the stitches through such doubled edge? Would she have discovered any advantage in the use of the binding, either in facilitating the manufacture of the shirt or by way of giving greater regularity and evenness to the fabric when completed? On the contrary, is it not almost certain that she would have regarded the binding as a mere waste of material when the bosom was to be permanently attached to the body?

So, also, it goes almost without the saying that, under the circumstances stated by the Court below, the fictitious "workman in 1872" would have no mental apprehension of the idea which underlies the Cluett invention.

On this point the words of Prof. Robinson, in his excellent work on patents, are pertinent. He says (Sec. 79):

> "No exercise of the faculties can form a part of the "inventive act unless the idea resulting from such exer- "cise is fully apprehended by the mind of the inventor. "To create by accident, without a recognition of the fact "or note of his own creation, and consequently without "the power to repeat the same creative act, is not in- "vention. While previous intention to create in this "especial form, or even to create at all, is not required, it "is essential to the inventive act that the inventor should "not only *conceive*, but should also *perceive* his original "idea, and should do both so clearly as to make this idea "an actual addition to his fund of knowledge, and be able "to communicate it to the public."

Third. The various cases cited by the Judge at circuit, and upon which he seems to have relied in support of his conclusion of non-patentability, are, on examination, not found to be pertinent.

In the leading case of *Pennsylvania Railway Co. vs. Locomotive Truck Co.*, 110 U. S., 490, the patent was defeated upon the ground of mere *double use* of the invention. A swiveling truck which had previously been used under cars, was put under the forward end of a locomotive. In this new position it worked in the same way as before, was used for the same purpose, and accomplished the same result. The Court, with citation of many authorities, held that in this double use there was no invention. The Court said:

> "It is settled by many decisions of this Court * * * that the "application of an old process or machine to a similar or analogous "subject, with no change in the manner of application, and no results "substantially distinct in its use, will not sustain a patent."

In *Stimpson vs. Woodman*, 10 Wall., 117, the patent involved was for a machine for pebbling leather. Previously, in the finishing of leather, machines had been used in which a regulated pressure was applied to the surface of the skin by means of a roller with a smooth face; also the surface of leather had been finished by the used of *hand* rollers having a grained or pebbled surface. The patent covered, substantially, the use of a *machine* provided with a roller having a *pebbled* surface.

This was regarded by the Court as a mere double use of an old device, not involving invention.

In *Gardner vs. Herz*, 118 U. S., 180, the patent seems to have been held invalid on similar grounds. The patent involved was for an improved chair seat, made of a wood fabric, consisting of two or more layers of perforated wood veneers, arranged with the grains of the different layers lying crosswise of each other.

As this material was old, and as it was used in the chair

seat in the same way in which wood had previously been used, the Court evidently regarded this new use of a perforated veneer as a mere double use. The Court said:

> "A patent cannot be taken out for an article old in purpose and "shape and mode of use, when made for the first time out of an exist- "ing material, and with accompaniments before applied to such "an article, merely because the idea has occurred that it would be a "good thing to make the article out of that particular old material."

In *Phillips vs. Detroit*, 111 U. S., 604, the patent related to a pavement consisting of wood blocks set on end upon a gravel bed, the blocks being left in the natural form of the log from which they were cut, and the interstices being filled in with gravel. The Court said:

> "The improvement described in the applicant's patent consists "* * * in simply taking a material well known and long used in "the making of pavements, to wit, wooden blocks set vertically, and "with them constructing a pavement in a method well known and "long used. It is plain, therefore, that the improvement described "in the patent was within the mental reach of any one skilled in the "art to which the patent relates, and did not require invention to "make it, but only the use of ordinary judgment and mechanical "skill."

In *Estey* vs. *Burdett*, 109 U. S., 633, one claim of the patent related to the size of the valve opening in the organ. The Court considered this a mere matter of degree, and, therefore, not patentable. The Court said:

> "The dimensions of the valve opening and of the valve are regu- "lated by the judgment of the manufacturer, as to the quantity of air "necessary and the resistance to be overcome in working the valve, "and the inconvenience in the leakage of the air."

So in *Pumice Holder Co. vs. Ferguson*, 119 U. S., 335, the Court regarded the relative size of two parts of the patented machine to be a mere matter of degree, and, therefore, because within the ordinary skill and judgment of the mechanic, not patentable.

The only novelty which the Court found in the patented

press was that the rack holding the pumice was made somewhat larger than the guide frame. The Court said :

> " There is no invention in making the guide frame and the rack of " the desired size. It required only ordinary skill and judgment."

In *Yale Lock Co. vs. Greenleaf*, 117 U. S., 554, the only difference (as regards matter pertinent to the present case) which the Court found between the patented lock and the old locks, was the change of shape in the irregular aperture of the wheels through which the key was thrust, to conform to the shape and size of the key to be inserted. As to this the Court said that it " would occur to the rudest and most unskillful mechanic."

In *Stevenson vs. Brooklyn Co.*, 114 U. S., 149, the Court held the patent bad as being for " a mere aggregation of separate devices " in street cars, " each performing the function for which it is adapted when used separately, and the whole contributing no new result as the product of the joint use "—being the familiar doctrine of aggregation as distinguished from patentable co-operation.

Reckendorfer vs. Faber, 92 U. S., 347 (not, however, cited by the Circuit Court in this case), is, perhaps, to be regarded as the leading case on this doctrine of aggregation. The Court held that there was no invention involved in merely associating a lead for marking and a rubber for erasing pencil marks, upon the opposite ends of a pencil handle or holder. The language of the Court was :

> " The law requires more than a mere change of form or juxtaposi- " tion of parts, or the external arrangement of things, or of the order " in which they are used, to give patentability."

In *Hollister vs. Benedict Co.*, 113 U. S., 59, the Court held that the slight change in the patented revenue stamp, as compared with the older stamps, was the logical and almost inevitable result of the growth of and experience in the revenue sys-

tem. The Court declares it to have arisen by "immediate inference from the existing regulations," and says that it involved "only the exercise of the ordinary faculties of reasoning upon the material supplied by a special knowledge."

To the law as laid down in each and all of the foregoing cases appellants take no exception. They say, however, that the case at bar is unlike any of the cases cited.

The changes which Cluett made in dress shirts regarded as an article of manufacture, are not referable to the head of "double use," or of "degree," or of "aggregation," or of "change of form," or of mere "ordinary judgment."

Cluett made use of an old device, it is true, to wit, a "folded binding;" *but he used it in new relations, and for new purposes, and with the achievement of a new and valuable result.* He employed this old device, a "folded binding," as the means of combining a shirt bosom with a shirt body. He did this with the intelligent purpose of thereby obviating defects which had long existed in the manufacture of dress goods of this class, and which the inventive faculty of the art seemed unable to overcome. The result was a greatly improved article of manufacture, and one which speedily obtained wide popularity.

Fourth. It is a recognized argument in support of the patentability of a new thing done that it works an improvement in the art—that there were long-existing defects in the art which are overcome by the new thing done.

On this point Cluett's own testimony (pp. 86–87) seems directly in point (italics ours):

"In the spring or early summer of 1874, *after numerous experiments*, I produced a shirt, the bosom of which was attached by a *folded binding* to the outer edges, the object of this improvement being to obtain a uniform seam or finish entirely around the bosom from yoke to yoke.

"*By this means the appearance of the bosom was greatly improved, both in its outline and by the doing away of wrinkles or creases, which were very common in bosoms made in the old manner.*

"*The binding also produced a heavy welt on the outer edge of the bosom, which added strength to the bosom and prevented its wrinkling by the motions of the arms or body.*

"*This binding, pocketing or covering the various raw edges of the bosom and the shirt, where attached to the bosom, prevented the fraying out of loose threads and the consequent disfigurement of the outer surface of the bosom.*

"Not only was the appearance of the shirt greatly enhanced, *but the durability of the garment was also materially increased.* The binding, forming a heavy welt or ridge, prevented the cutting of the body of the shirt near sides of the bosom, a common occurrence in the old style of shirt. In the old style of shirt the thin edges of the bosom tended to cut the body of the shirt at the sides of the bosom, by the constant friction of these parts occasioned by the motion of the body.

"*I found that the bound-bosom shirt could be produced with greater facility than where the bosom was made in the old manner.* Under the old plan the outer edges of the bosom of the upper and under ply were folded up to the interlining or middle ply, or to a line nearly corresponding to the same. A line of stitching was then put through these plies and the bosom was then ready for insertion into the shirt. The folding and stitching above alluded to extended down the sides of the bosom only. The bottom of the bosom was cut straight or square, and the raw edges of the same were covered by a folded piece of linen or other material, this folded piece being so stitched to the bottom of the bosom that it covered the raw edges of the bosom at that point, also those of the shirt and the tab, which was placed under the lower part of this strap or folded piece of material already described. It was not an unusual thing for this strap to wear out and expose the upper portion of the tab which it was intended to cover. It was also a common thing for this strap to break away from the bosom or from the tab, as the strap was only secured to these parts by a single line of stitching, and consisted of but one ply of material. The preparation of these various parts which I have described and attaching the same to the shirt was rather a difficult and slow process.

"The binding of the bosom dispensing with the strap and embracing the edges of the shirt and of the tab when completed was found to be not only a saving of time but also of material. In the bound-bosom shirt the folding in of the outer edges of the bosom was

dispensed with, and this accomplished two important results: *First*, the outer edges of the bosom being uniform and being bound in this condition rendered the fulling up of any one of the plies or wrinkling of the same much less likely while the bosom was being made; *second*, less material was required in cutting the three plies, as there was no folding in of the outer edges required.

"Where the bosom was inserted into the shirt under the old method already described, the body of the shirt, or that portion which had been cut to correspond with the shape of the bosom, was inserted into the sides of the bosom between the folded parts already mentioned and secured by a single line of stitching. The fact that the sides of the bosom were attached to the shirt by a single line of stitching rendered that portion of the shirt somewhat insecure, as the shirt frequently broke away from the stitching above alluded to."

Fifth. Another argument in support of the patentability of the improvement made in the art by Mr. Cluett, is found in the fact that this improvement was with him the result of careful and prolonged study and experiment. He says, on page 86, that he produced his improved shirt in the spring or early summer of 1874, "after numerous experiments."

It also appears in the testimony (pp. 37 and 220) that, in his endeavors to overcome the defects in dress shirts, he made other inventions before he hit upon that covered by the patent in suit.

Sixth. Another argument in support of the patentability of the improvement made by Cluett is found in the fact that, notwithstanding the favor with which the invention was received by the public, yet for some eight years after the patent issued, and down to the time when the infringement now complained of began, there was practically a public acquiescence.

Although the plaintiffs pushed their bound-bosom shirts vigorously and advertised it widely from the very day of the patent, Mr. Cluett testifies that he was not aware of any infringements prior to the year 1882 (p. 36). Meanwhile, however, a license had been granted to a large house in Troy—Herrman, Aukam & Co.; Rothschild Bros. & Gutman of New York City

had applied for a license but had been refused on the ground of the existing license to Herrmann, Aukam & Co.; and other large manufacturers in New York and Boston had acknowledged the plaintiff's rights under the patent (pp. 37-38).

Seventh. An examination of the record shows that after the grant of the patent in question, various other patents issued for modified forms of applying the generic idea embodied in plaintiffs' patent. Among these may be mentioned the patents of *Wm. L. Hall*, No. 276,809, May 1, 1883; No. 308,607, December 21, 1884 (pp. 444-448); No. 331,786, December 8, 1885 (p. 459); No. 336,106, February 16, 1886 (p. 462); *G. W. Pine*, No. 313,520 of March 10, 1885 (p. 450); *Max Herrman*, No. 319,487, June 8, 1885 (p. 453); No. 322,717, July 21, 1885 (p. 455); No. 322,718, July 21, 1885 (p. 457); No. 332,799, December 22, 1885 (p. 460).

It is respectfully submitted, therefore, that the work done by Cluett bears all the indicia of invention. It was the result of study and investigation on his part, directed to the ascertainment of the cause of the existing recognized defects in dress shirts and the devising of a remedy therefor. This involved the creative faculties, and not the mere exercise of good judgment or mechanical skill. The patentee seems clearly within the rule laid down by Robinson (Sec. 78 of his work on Patents):

> "The mental faculties employed in the inventive act are "the *creative* not the *imitative* faculties. *An invention is* "*the product of original thought. It involves the sponta-* "*neous conception of some idea not previously present in* "*the mind of the inventor.* Industry in exploring the dis- "coveries and acquiring the ideas of others; wise judgment "in selecting and combining them; mechanical skill in "applying them to practical results—none of these are "creation, none of these enter into the inventive act. Only "when the mind of the inventor originates an idea new to

> " himself, if not to all the world, does he call into exercise
> " his own inventive skill and perform the mental portion
> " of the inventive act."

Never before had it in fact occurred to any one that by the use of a " folded binding " the irregularities before existing in the bosoms of dress shirts, arising both from the loose threads working in between the plies of the bosom and from the inequality of strain put upon the different parts of a shirt bosom by the old methods of attaching a bosom to the shirt body, could be effectually overcome; nor can it be presumed that the hypothetical " mother in 1870," or the hypothetical " intelligent workman in 1872," existing in the imagination of the Court below, even if under the conditions of the hypothesis that created them they had sewed a bound dicky on to a shirt front, would have discovered that that temporary and exceptional expedient had opened up a remedy for the evils that had long perplexed the trade.

Another test of the presence of that quality which the law calls " invention," is laid down by Walker, in Section 40 of his excellent work on Patents, second edition, in these words:

> " When the other facts in a case leave the question of
> " invention in doubt, the fact that the device has gone into
> " general use, and has displaced other devices which had
> " previously been employed for analogous uses, is suffi-
> " cient to turn the scale in favor of the existence of inven-
> " tion."

This statement of the doctrine is quoted almost literally from the decision of the Supreme Court in *Smith vs. Dental Vulcanite Co.*, 93 U. S., 486, and seems specially applicable to the case at bar.

Eighth. Not to multiply citations of authorities, a case which seems to be specially germane to that at bar is that of *Straus vs. King*, 18 Blatch., 88, decided by his Honor, Justice BLATCHFORD, at the circuit.

The invention consisted in "the employment of a metal rivet or eyelet at each edge of the pocket opening [in pantaloons, &c.] to prevent the ripping of the seam at those points" —the rivet being so fastened in the seam as to bind together the two parts of cloth forming the seam, thus preventing the strain from acting upon the thread with which the seam was sewed.

The case was a notable one. The patent was assailed with great vigor on the ground of the alleged want of patentable novelty, the claim being made that the invention was nothing more than the employment, at the corners of a pocket opening, of an old and well-known rivet which had previously been used for strengthening seams at other points, and which in its new position performed no new function. It was also urged that the use of the rivet, in addition to the thread, for the purpose of giving greater strength to the seam, did not constitute a veritable combination, but only an aggregation. The Court, however, dismissed these defenses as without merit, and sustained the patent.

Ninth. It may not be out of place to suggest that the invention to which plaintiffs' patent relates is not to be held as devoid of patentable merit because, forsooth, it has not worked a *revolution* in the art.

It should be remembered that the human mind has been engaged with the subject of clothing and its modifications from the time when Adam and Eve were in the Garden of Eden; and it is not to be expected that in this field of invention any single improvement will produce any very radical changes in

the art. Generally, perhaps, it may be stated that inventions in clothing may be expected to involve only slight changes, but changes nevertheless requiring careful thought in their production and almost as careful thought for their recognition and appreciation.

An examination of the various patents included in the present record, of date subsequent to the Cluett patent in suit, shows that changes much smaller and less important than those described in the Cluett patent have been deemed by the Patent Office worthy of protection. It can hardly lie in the mouths of the defendants (see the various patents granted to Hermann, one of the defendants) to criticise the Cluett patent on the ground that it deals with the details of construction of an article of clothing.

It will hardly be contended by the defendants that the manufacture of fine shirts prior to 1874 was not attended with the various difficulties hereinbefore enumerated and specially set forth by Mr. Cluett on pages 6 and 7 of the record; nor will they be likely to contend, in the face of the large popularity which the "bound-bosom shirt" has attained, that the use of the "folded binding" as a means of uniting the bosom to the body has not wrought a substantial improvement in the art.

In the large shirt factories, prior to Cluett's invention, manufacturers of fine shirts, in order to secure acceptable work, had to employ women of superior intellectual qualities and manipulative skill; and the difficulties attending the manufacture of fine shirts by the old methods were greatly increased when the *shield-shaped* form of bosom, and other forms with curved outlines, were substituted for the original square-shaped bosom. One of the difficulties was to get the bottom centre of the shield-shaped bosom located directly under the buttonhole of the collar stud; and the bottom of the bosom was liable to be drawn to the one side or the other by the action of the sewing machine in the insertion of the bosom in the shirt. This difficulty being substantially

overcome by the introduction of the bound-bosom principle, it became possible to use a much more common class of workwomen for making even the finest grade of goods, and thus not only was the quality of the goods improved, but the cost of manufacture could be cheapened. It became possible also to substitute machines for doing much of the work which, under the old plans, could only be done satisfactorily by hand.

Tenth. Nor is any argument in support of the contention of non-patentability to be derived from the fact that, *after the event*, the improvement made by Cluett in the manufacture of shirts—whether to a judge on the bench or to a person skilled in the art is immaterial—seems a very simple thing to have done.

The fact is that the Cluett improvement was not an obvious thing, and cannot properly be called a simple thing. Such a thing had been needed for years; various things had been tried by those skilled in the art to overcome existing difficulties; when at last this was hit upon, it was recognized at once as a long-needed improvement. This final success was not the logical outcome of the prior state of the art; it did not follow, as a matter of course, from what had gone before; it was the fruitage of a careful and intelligent study of the whole subject to which it related.

Not to refer in this connection to the oft-repeated apochryphal story of Columbus and the egg, reference may be made to the history of the introduction of anthracite coal as a fuel, to show how a thing seemingly the most simple and obvious to one's present experience, may have required long years of study and experiment to accomplish in the first instance. The

story is graphically told in Vol. 15 of "Harper's Magazine," p. 451 (1857).

Col. Shoemacher barely escaped mob violence because of the repeated failures of his friends and acquaintances, to whom small lots of the coal had been sold, to make the "black stones" burn. Their threatening indignation was dissipated at last only when, by a mere accident at the Fairmount Nail Works, it was discovered that to secure good combustion with the hard coal it must be treated in a manner materially different from wood and bituminous coal and the other fuels then known to the art. Once ignited, it should be let alone, instead of being raked and stirred and blowed.

The burning of anthracite coal seems a very simple thing now, but it was effected originally only by long study and many fruitless experiments on the part of skilled and practical artisans.

Conclusion.

From the foregoing it abundantly appears:

1. That under the proper construction of the Cluett Patent No. 156,880 all three of defendants' shirts are infringements.

2. That the only alleged prior use which the Court below considered as even approximately established—that at Chatham, N. Y.—cannot be held to affect the patent;
   (a) Because the Chatham shirts do not contain the patented invention; and
   (b) Because the dates of the manufacture of these

shirts are not satisfactorily established as prior to Cluett's invention; the burden of proof in this regard being on the appellees.

3. The new features of shirt construction set forth in the Cluett patent, as compared with the various things in the prior state of the art, constitute a veritable invention.

The Cluett invention effected a marked improvement in the art; it overcame recognized and long existing defects; it was the result of experiment and study, and not come at logically and as a matter of course in the regular and inevitable development of the art. It is not a case of double use, nor of aggregation. In short, the Cluett improvement exhibits all the indicia of invention as distinguished from mechanical skill.

The judgment below should be set aside, and the cause remanded with instructions to enter a decree for the plaintiffs.

S. A. Duncan,
J. A. Skilton,
Of Counsel for Appellants.

FILED,
APR 18 1891
JAMES H. McKENNEY

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OCTOBER TERM, 1890.

NOS. 174 AND 175.

GEORGE B. CLUETT ET AL.,
Appellants,

vs.

HORACE B. CLAFLIN ET AL.,
Appellees.

TWO CASES.

GEORGE B. CLUETT ET AL.,
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vs.

ED. ELISHA MACK ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

DAVID TIM,
Of Counsel for Appellees,
No. 280 Broadway,
New York City.

MARTIN B. BROWN, Printer and Stationer, 49 and 51 Park Place, N. Y.

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These are two suits against the firm of Tim, Wallerstein and Company, Horace B. Claflin and others of New York and Troy, and one against the firm of Mack and Company, of Albany, N. Y., brought by the firm of George B. Cluett, Brother and Company, of Troy, as owners of United States Letters Patent, No. 156,880 of November 17, 1874, for an improvement

in shirts, to restrain an alleged infringement of the same by the defendants.

The main defenses upon which the defendants rely are twofold—prior and public use and want of invention.

I.

Want of invention in complainants' patent.

Notwithstanding the fact that the printed record is voluminous, the real issue involved is whether any patentable invention is described in the claim of the patent reading as follows:

"*In combination with a shirt-body, a shirt-bosom bound on the outer edge with a folded and stitched binding and attached to the shirt-body by a separate line of stitching through such binding.*"

It is a matter of common knowledge that textile fabrics have been bound since time immemorial. It is also apparent that the object of binding the edge of a textile fabric, the fibres of which have been cut, is to ornament the edge and to cover the raw, loose, and cut threads, and in many cases also to strengthen the fabric at such edge.

Complainants' patent is for an old combination of old elements. Long prior to the date of the Cluett patent it was not new

To make shirt-bodies, nor
To make shirt-bosoms, nor
To make shield-shaped bosoms, nor
To bind the outer edge of shirt-bosoms, nor
To pocket the raw edges of fabrics by a binding, nor
To fold a binding, nor
To attach bound-bosoms to shirt-bodies by inserting them in or laying them on the shirt-body.

In fact the counsel for appellants admits these facts, for on p. 37 of his brief he states: "It thus appears that it was not new in the spring of 1874 (the established date of Cluett's invention) to make dress shirts by securing a linen bosom to the body of the shirt by a row of stitches passing through the edge of the bosom; also, it is admitted, it was matter of common experience to apply narrow bindings in various ways—in fact, to apply 'folded bindings,' that is, bindings with their edges turned in under the body of the binding—to the edges of various parts of different articles of wearing apparel, to conceal the raw edges from sight and protect them from being frayed out. * * * * Dickies, also, had been made whose edges had been provided with a folded binding. Firemen's shirts, also, had been made of flannel, on the bosom part of which an extra thickness, cut out shield-shaped, had been secured by sewing through the edge." And on page 45 of said brief he states, "Cluett made use of an old device, it is true, to wit, a 'folded binding,' but he used it in new relations and for new purposes, and with the achievement of a new and valuable result. He employed this old device, a 'folded binding' as the means of combining a shirt bosom with a shirt body." Here it may be asked to what new relations, purposes and valuable results does counsel refer, for it has been already shown, and he admits it was old, to bound bosoms or to attach bosoms to shirts by stitching, and certainly if there were any valuable results they were not produced by simply attaching the bosom to the shirt by means of stitching.

All of the above is abundantly shown by the testimony.

Large quantities of shirts have been introduced by complainants; any quantity of patents taken before or after the one in suit have been piled into the case; numerous sample cards, volumes of testimony about Jeddo and Roman cord, and binders and sewing machines have been injected into the record for the *evident purpose* of befogging the issue.

The patent *is not* for machinery, nor for a machine-made shirt, nor for the bosom alone nor any of the old elements

mentioned in the patent alone; it is for an old combination of old elements, if for anything.

The Nicoll patent of 1864 (p. 663) introduced by defendants, is worthy of the Court's special attention, as it contains several, if not virtually all the elements of the patent in question.

On page 8 of said patent, between lines 5 and 25, a method of pocketing the raw edges of fabrics is clearly explained.

On page 6 of said patent, between lines 10 and 20, a machine is described, the object of which is, "to insure a perfectly true edge when stitching or hemming around a curved surface."

In the file wrapper of complainants' patent on page 66 l, the Patent Office says:

"It is but a common expedient to bind any part of a garment, and it is not new to apply bosoms to the shirt body instead of inserting them therein." Complainants' expert Benjamin (x-Q. 27, p. 24) admits that detached bosoms or dickies had been bound with a binding at the edge of a bosom consisting of several plies and that the raw edges of such bosom had been included within a folded binding.

One of the most important, if not the most important admission made by complainants, and which in itself is sufficient to sustain the decree of the Court below, is to be found in the testimony of Robert Cluett, the alleged inventor of the matter here in dispute, who admits (x-Q. 27, p. 223) that his firm as early as 1869 or 1870 manufactured and sold shield-shaped detachable bosoms or dickies, the raw edges of which had been bound by a folded and stitched binding (see Complainant's Exhibit, Cluett bound bosom, E. S. B., special examiner, November 16, 1886), and his brother J. W. Alfred Cluett, also one of the complainants herein, testified to the same effect (x-Q. 33, p. 209), thus clearly showing that these complainants themselves about four years prior to filing the petition for the patent in question introduced and sold in the market bosoms for white shirts with a folded binding stitched around the edge of the bosom.

It may therefore fairly be asked, did it require invention

in the spring or summer of 1874 (that being the earliest date of the alleged invention as fixed by the inventor himself, Q. 13, p. 86) to stitch the Cluett Bound Bosom of 1869 or 1870 or bound dickies "to the shirt body by a separate line of stitching through such binding"?

This alone, according to the argument of counsel for appellants, as hereinbefore quoted (p. 45), appears to be the important feature of the Cluett patent, and yet, as hereinbefore stated, he admits (p. 37) it was not new, in 1874, to make dress shirts by securing the bosom to the body of the shirt by a row of stitches.

The opinion of the Court below is so complete on this point that it is unnecessary for the appellees to dwell further thereon. It is one of those cases that comes within the purview of

Phillips *vs.* Detroit City, 111 U. S., p. 604.

where it was held "where no invention was required for the construction of the improvement described in a patent, and it demanded only ordinary mechanical skill and judgment, and but a small degree of either, it is not patentable."

> In the case of Gardner *vs.* Herz, 118 United States Reports, 180, held that a patent cannot be taken out for an article, old in purpose and shape and mode of use, when made for the first time out of an existing material, and with accompaniments before applied to such an article, merely because the idea has occurred that it would be a good thing to make the article out of that particular old material.

And as was said by the Court below (p. 671), the record discloses less invention than was shown in any of the following cases:

Pennsylvania Railroad Company *vs.* Locomotive Truck Company, 110 U. S., 490; Stimpson *vs.* Woodman, 10 Wallace, 117; Stephenson *vs.* Brooklyn Railway Company, 114 U. S., 149; Yale Lock Company *vs.* Greenleaf, 117 U. S., 554;

Thatcher Heating Company *vs.* Burtis, 39 O. G., 587; Estey *vs.* Burdett, 109 U. S., 633; Clark Pomace Holder Company *vs.* Ferguson, 119 U. S., 335; Phillips *vs.* Detroit, 111 U. S., 604; Gardner vs. Herz, 118 U. S., 180.

All of the foregoing has been said without reference to the state of the art, as shown by defendants, and without reference to the testimony of prior use. It represents the case solely with reference to complainants' patent and their own testimony.

In addition to this the defendants introduce the Nicoll English Patent No. 1,894 of 1846, p. 663, which relates to a "novel mode of finishing the edges of shirt collars and cuffs or wristbands and parts of garments and other articles which are suited to receive binding." Upon examination of the method here described, we find that it describes a binding like that on the shirt body in Defendants' Exhibit, Shirt No. "3," except that the shirt body is not included within the folded binding. It is also like the binding at the edge of the bosom of Defendant's Exhibit "A."

Counsel for appellants argues that the Court below, in its opinion, disregards all of defendants' proof as to prior use, except at Chatham, as unworthy of belief; but here he is in error, for on p. 669 the Court says that "the greater part, however, may be laid aside."

It was clearly shown in the testimony of the defendants' witnesses, exclusive of Ford, Clark & McClelland as to Chatham anticipation, that woolen shirts and laundried shirts were made long before the Spring of 1874 with bosoms having a binding around the outer edge, which said evidence was in no wise contradicted or controverted by the complainants, and, therefore, the Court below on this evidence found (p. 670): "At the time the patentee produced the combination in question, namely, in the Spring of 1874, the art of binding textile fabrics for ornamentation, strength and preservation was very old; shirt and shirt bosoms, and bosoms with binding around their outer edges were not new; woolen shirts with bosoms bound and attached on one side

alone, and on both sides the shirt body by a line of stitches either through or just inside the binding, and laundried shirts with ruffled or puffed bound bosoms were well known." Thus it is evident that the Court below took cognizance of the testimony on behalf of defendants relating to woolen shirts and ruffled or puffed bosoms.

II.

The Cluett Patent.

The application for this patent was filed August 10, 1874, and was granted November 17, 1874. The earliest date of the alleged invention is placed by Mr. Robert Cluett in the spring or summer of 1874, as appears by his testimony. (Q. 13, p. 86.)

The object of the alleged invention and its advantages are stated to be :

1st. To avoid folding in of edges of the bosom and raw edges and loose threads thereof.

2d. To stay the bosom and render it firmer in itself, and less likely to rumple or break.

3d. To avoid wrinkling of the bosom by the uneveness or filling up of any one of the layers composing the bosom in any part thereof.

4th. And, as the patent says, " each and all of these three features having reference to the preparatory stages of manufacture, but to be completed in the bosom as attached to the shirt.

The claims of the patent are as follows :

First—In combination with a shirt body, a shirt bosom bound on the outer edge with a folded and stitched bind-

ing and attached to the shirt body by a separate line of stitching through such binding."

Second—The shirt bosom S, composed of two or more thicknesses of cloth, B L, bound on the outer edge with the binding B, and secured to the shirt front F by the line of stitching O (p. 342).

No broad construction can be given to this patent in view of the rejection, of the amendments, descriptions and claims; for both the first and second claims are truly convertible and interchangeable, one meaning not more than the other. The application for the patent was examined by the Patent Office and found wanting in patentable invention (p. 661); thereupon amendments were made in the specification after the rejection by the Patent Office (p. 661), and the amendment called B, reading that "The invention consists in the shirt bosom, or shirt and bosom so constructed, and not in the bosom alone," shows clearly that no broad construction can be considered.

Counsel lays great stress on the fact that the Cluett patent covers laundried linen shirts, and that the Conger and Marr patents as also flannel and firemen shirts have no bearing, because they are not shirts to be laundried, but this argument is of no avail, if these patents and these woolen shirts anticipated the Cluett patent, and the Court below, as hereinbefore stated, found, as a matter of fact, that they were long in use prior to the Cluett patent. But the counsel does admit (p. 35) that Defendants' Exhibit "Nicoll" of 1864, shows the use of a folded binding attached to articles or garments by two rows of stitches. As this covers the Cluett claim, counsel endeavors to overcome the obstacle by saying Nicoll says nothing about dress shirts.

III.

Proof of Infringement.

(*a*) In the Claflin case.

The construction shown in Defendants' Exhibit Shirt No. 1 is clearly an infringement if the patent is valid.

Shirt No. 2 is not an infringement, for the very reason given by the expert (p. 18, Claflin case), because the line of stitching which secures the bosom to the shirt front is shown in this exhibit as within the line of stitching that secures the binding to the bosom, thereby differing in location from the line of stitching which secures the bosom, as shown in complainants' patent, and because both claims of the patent require this line of stitching to go through the binding.

Defendants' Exhibit, Shirt No. 3, is not an infringement, because a separate line of stitching does not secure a complete bound bosom to the shirt body; but the bosom and body are bound together by the binding in a way different from that shown in the patent.

(*b*) In the case against Mack.

This is a shirt with a so-called reinforce piece, and it does not infringe the Cluett patent, for the reason that the reinforce is clearly not a part of the shirt, and that the second line of stitching does not pass through the binding of the shirt bosom, connecting this bosom with the shirt body.

IV.

Prior and Public Use of the Invention.

Though the testimony given on behalf of the defendants is voluminous and shows that flannel and white shirts with bound bosoms were made and sold in the market long prior

to the application for the patent in question, yet the defendants deem it sufficient in this argument to confine themselves exclusively to

Defendants' Exhibit A. Defendants' Exhibit Clark model, and Defendants' Exhibit McClelland shirt.

These three shirts show in combination with a shirt body, a shirt bound on the outer edge with a folded and stitched binding and attached to the shirt body by a separate line of stitching through said binding, being the claims of the Cluett patent in suit.

According to the testimony on behalf of defendants and not contradicted, large numbers of this style of shirt, represented by the three exhibits, were made and sold at Chatham Village, in this State, long prior to 1870, and probably as early as 1866, and almost continuously up to the date of this suit.

One Hiram M. Ford kept a gentlemen's furnishing goods store at Chatham between 1864 and March 1880. From about 1868 until 1880 one Myron E. Clark was Mr. Ford's clerk in this business, and from March, 1880, to March 1882, this Mr. Clark was a member of the firm of Clark & Smith, successors in business to Ford, and in 1882 Clark became the sole owner of this business.

The testimony shows that Ford devised the style of shirt represented by Exhibit Clark model and the McClelland shirt, and he considered it an improvement upon the old style of shirts. The shirts made by Ford and Clark were of the exact shape of Exhibit A, that is, shield-shape. There were, however, others of different shape, called coffin-shape, and some with a double curve on each edge and square across the bossom, these various styles being represented in the sketches made by Clark and referred to in his testimony, page 547. Some of these bound bosoms made by Ford and Clark had one row of double stitches on the binding, and some two.

Clark entered the employ of Mr. Ford when he was eighteen years of age, but he says that Mr. Ford did all the cutting and planning and he ran the machine, and that he learned the

business from Ford. He also states (x-Q. 230, p. 560) that he had never seen a Cluett bound bosom shirt.

On page 555, x-Q. 162, he said he made a portion of all shirts manufactured by Ford after 1869. On page 568, x-Q. 321, he says : "My experience as a shirtmaker is confined to the one little store, and I don't think I have been in a shirt factory where shirts are made and cut in my life."

History of Exhibit "A."

Counsel has argued at great length in his brief that Defendant's Exhibits "A" and McClelland shirt, although bound, did not contain the folded binding contained in the Cluett patent. This the defendants' witnesses deny, yet it is immaterial whether these shirts had the folded binding or not, for counsel admits in his brief, as hereinbefore stated (pp. 36 and 37), that long prior to the Cluett patent bosoms were used with folded binding ;, but it is an evident fact that these Exhibits "A" and "McClelland's" shirt do show that the stitching of the bosom to the body of the shirt was through the binding, which undoubtedly appears to be the important claim of the Cluett patent made by the counsel for appellants in his brief (p. 45).

He devotes from page 27 to page 33 of his brief commenting upon the testimony of Judge McClelland, assailing the same in minor details, but not in the salient and material parts. But of what avail can all this be when the Judge produces on the trial, and offers in evidence, a shirt identically like the Cluett patent, which he swears positively, and without contradiction, was made for him prior to 1870 by Ford.

Mr. Clark testified that Defendants' Exhibit "A" was one of a number of shirts which had been inventoried to him by Ford, and had come to him from the firm of Clark & Smith, and at the request of defendant's counsel, Mr. Clark produced the bundle from which Defendants' Exhibit "A" was taken. He produced thirteen other shirts, five of them made by him, five of them by the firm of Smith & Clark, and one he thinks by Mr. Ford, eleven of them with binding and two without

binding. He states that Exhibit "A" was one of two shirts made for one J. H. Mambert; that Mambert called for it, and paid for the one and probably left the other; that it was the custom of their business at that time to put the name of the purchasing party upon the tab of each shirt. For that reason Exhibit "A" bears the name of Mambert; but he doesn't claim to be very certain on this point.

J. H. Mambert is called on behalf of complainants to contradict this, and states that it is true that he did buy two shirts from Ford, perhaps in 1877, perhaps in 1878, and possibly in 1879, but says (Q. 29, p. 277) that he *does not think* that the two shirts he ordered were bound bosoms. He does not make a positive statement or contradiction of defendants' witnesses.

It is of importance in this connection to notice his testimony upon his cross-examination (pages 279, 280 and 281) in which he at first recklessly testifies that he had last seen the shirts about three or four years ago; finally it appears that he didn't see them in seven or eight years, and that he didn't know what became of them, and supposes they went into the rag bag. Moreover, he says that in the fall of 1879 he did go to Ford's store, and talked about getting some more shirts of the kind that he had had. It would seem that Mr. Ford agreed to give him credit, and talked of taking his measure, but his measure had theretofore been taken. It may, therefore, be true that he did get two shirts in 1877, and that these shirts were exactly like Exhibit "A," notwithstanding his indefinite testimony. It appears, however, that the conversation which he admits he had with Clark in 1879 was misunderstood.

This man Mambert, after recklessly testifying that he remembered from a superficial examination of the shirts at the time he received them, the construction of the shirts purchased in 1877, and that he did not think they had a binding, finally admits in the very last answer of his deposition (R. x-Q., 142, p. 285) that it is almost impossible, after the starch is washed out of the bosom, to tell whether or not there was a binding.

Though the counsel for appellants claims in his brief (p. 3) that defendants claim this shirt was made prior to Cluett patent, it must be remembered that defendants make no such claim. They only produce this exhibit for the purpose of showing that this was a shirt in an old bundle of which came to Clark from the time of Ford, and that it truly and fairly represented the style of shirt made as early as 1866, and certainly prior to 1870, by Ford.

It is true Ford demanded the payment of $1,000 for his testimony, but it will be seen from his examination that although subpœnaed by the defendants he was a hostile witness and was unwilling to give his testimony until compelled to do so by the Court.

The defendants deny that they ever promised or agreed to pay him money in any wise; it cannot be said that the mere demand to pay for testifying is in itself sufficient to discredit his testimony especially when he is corroborated by Clark and McClelland, two disinterested witnesses, whose testimony is in no manner or form impeached or attacked.

An expert giving testimony in a patent suit demands and receives compensation in very large amounts which are far in excess of witness fees; yet the testimony of experts is received by all Courts without regard to their fees, and their refusal to testify or demand for payment of these fees does not invalidate their testimony.

Judge Hugh McClelland, who, at the time of testifying, was the County Judge of Columbia County, New York, testified that he had his office right opposite Ford's store; that he was Surrogate of Columbia County in the years 1868, 1869, 1870 and 1871; and that he has been County Judge of Columbia County since about 1878.

He swears positively that between 1867 and 1870 he lived at Chatham, and that he knows that during this period he bought shirts like Exhibit "A" from Ford, and he saw Clark working at the machines, and frequently noticed the binding, and that his order always consisted of six shirts; that prior to 1867 his family used to make the shirts at home for him,

and after 1870 he bought the shirts at Hudson and had his son-in-law buy them for him.

The counsel for the appellants remarks in his brief (pp. 16 and 18) that defendants' witnesses failed to produce any of the original shirts made by Ford prior to 1874 for McClelland.

The evidence shows counsel to be mistaken, for while Judge McClelland was under examination as a witness, complainants' counsel wrote him a letter requesting him to make search in order to find one of the shirts made by Ford prior to 1870 and (in answer to x-Q. 136, p. 590) he produced the remnants of an old shirt which he found in the garret of his house among some old rags, and which he particularly remembers that he bought from Ford between the years 1867 and 1870 from the fact that there is a single stud hole in the bosom, he wearing at that time a stud with a screw as an ornament in his shirt bosom; which said shirt is the shirt marked McClelland's shirt, offered in evidence.

Upon examining this (Mr. McClelland's shirt) it will be found that a new lining, or back ply, was put behind the bosom after the shirt body had worn out; that the tab was turned inside, and that the bound bosom was probably applied to a new shirt body.

The counsel also comments on the fact that these witnesses cannot fix the date of the manufacture of the shirts, but in this he is in error, as they do fix the time as being prior to 1870, but are asked in x-Q. 209, p. 183, whether they can fix the date of the manufacture of a particular lot of bound shirts, to which they replied in the negative. The witness Ford fixes the date of the manufacture of these shirts as will be seen on pages 467, 468, 469, 472 and 473.

The witness Clark fixes the date of the manufacture, as will be seen on pp. 543, 548 and 554; and the witness McClelland, on pp. 575 and 576; in x-Q. 44, p. 579, and x-Q. 71, p. 582, he swears positively that the first order was given before 1870, and is quite sure that it was as early as 1868, and therefore the Court below committed no error in saying (p. 670): "Judge McClelland positively and with reiteration testifies that he bought bound bosom shirts prior to 1870, and

gives facts and circumstances which render it quite improbable that he is in the wrong. To be sure he is shown to be mistaken as to minor details in a few instances, but upon all material questions his testimony remains entirely unshaken, and when in connection with the evidence of Ford and Clark, it can hardly be said that there is a reasonable doubt remaining regarding the Chatham anticipation."

The counsel also states in his brief that these witnesses did not give any reason for fixing the date as being prior to 1870, but the witness Clark remembers the occurrence from a fire which destroyed an entire street in Chatham, and Judge McClelland, from the fact that after 1870 he removed his office to Hudson, and that this, in connection with the fact that his salary was raised at this time enables him to remember when he bought shirts at Ford's store, having his office prior to 1870 in Chatham.

Comment is made in the appellants' brief upon the fact that neither Ford or Clark produces any books; they testify, however, that they made diligent search but could not find any books pertaining to their respective business prior to 1870; that when Ford sold out to Clark the books of his business were retained by Clark, and the mere inability to produce these books would not be sufficient ground to disregard the testimony of these witnesses when the same is not otherwise impeached or contradicted.

It will readily be believed that in a small business as was conducted by these parties in a country village, books are not ordinarily kept and preserved in the same way that they would be in a large manufacturing establishment in the city.

Counsel for appellants in his brief (pp. 23 and 27), states he does not want to impeach the honesty of the witnesses Clark and McClelland, and admits them to be men of probity with one breath, and immediately with the same breath states that their testimony is untrustworthy.

He does not, in his testimony, endeavor to attack the character of these gentlemen, and it certainly cannot be presumed that he desires this Court to infer that Mr. McClel-

land, who has held the positions of Surrogate and County Judge, would commit wilful or corrupt perjury.

He also asks on page 32 of his brief why the criticisms of the Court below upon the general class of testimony does not apply to the deposition of the witness McClelland, and the answer to this can be found in the opinion of the Court below page 670, "Judge McClelland gives facts and circumstances which render it quite improbable that he is in the wrong."

The said argument as against the testimony of Ford, Clark and McClelland by said counsel is based, in a great measure, upon surmises and suppositions on the part of said counsel, but facts positively and sufficiently proven cannot be overcome in this manner; there must be positive testimony to contradict them or to show they are unworthy of belief in order to throw discredit upon their testimony, and it is an acknowledged fact that defendants show by the clear, unmistakable and uncontradicted evidence of Ford, Clark and McClelland, prior, undisturbed use in Chatham village from 1868 to 1882. The production by McClelland, of the shirt made by Ford for him prior to 1870, is of itself without further evidence sufficient to establish prior anticipation, notwithstanding the six pages of comments by counsel on McClelland's testimony.

VI.

As to Complainant's Expert, Benjamin.

To show how biased this expert is, it is only necessary to read his testimony on p. 17, in which he says that both claims are for an article of manufacture, "the shirt as a whole, comprising a shirt body and a shirt bosom attached to said shirt body through the intermediation of a folded and stitched binding and one or more lines of stitching."

A comparison with the first claim will show that this is not correct, for he omits, first, that the bosom must be bound

on the outer edge ; and second, that a separate line of stitches must go through a folded and stitched binding already on the bosom.

The second claim he defines "comprising a shirt body and a shirt bosom bound on the outer edge with a binding, and attached to said shirt body."

By referring to the second claim, we find that he has omitted the particular binding B and the separate line of stitching O.

VII.

Defendants' Expert.

William E. Hagan, of Troy, has been an expert for the last twenty-five years, with special knowledge of the inventions affecting shirts, collars and cuffs.

He points out that the Marr Patent (Defendant's Exhibit, p. 510) illustrates and describes a bosom shirt as follows: "The edges of each fly and the bosom front may be bound with binding." Q. 4, p. 630.

He also shows that the specification of the Nicoll patent (Defendant's Exhibits, p. 510), after describing a method of binding a garment, says: "a second line of stitches through the article, and through the underneath portion of the binding which has been turned under, taking care that these stitches be as close as possible to the upper edge of the binding without catching it." Q. 5, p. 830.

On p. 632, Q. 6, he thoroughly explains the various exhibits known as Defendants' Exhibit "A," Exhibit "X," Borchardt shirt, Exhibit "Y," Borchardt shirt, Exhibits Isaac Wallach shirt No. 1, and bosoms 1, 2 and 3. On p. 625 he calls attention to the distinction between raw and selvedge edges, which expert Benjamin had used as convertible terms.

On p. 637 he says: "On examining the drawings of the patent, I find that a binding is applied to the edges of the bosom, and this binding is shown as turned in upon its edges; but there is nothing in the patent, as I read it, which states that this turned in condition of the binding edges is a necessity.

In XA 41, in answer to the question "As a matter of fact, then, you do not find that there is no invention in the Cluett patent here in suit, do you?"

Mr. Hagan says:

"I don't pretend to discuss this question in its legal aspects, but as I am asked a direct question as to matter of invention, I answer to the best of my understanding, *that there is no invention* in it. I can't conceive that in adding a single row of stitching to a bound bosom, which is an old device to connect it to the body of a shirt, would call for the exercise of any inventive faculty whatever; that it would merely call into use the ordinary and simple experience of a needlewoman. A bosom having been bound before, as stated in some of the older patents to which I have formerly alluded, I can't conceive that the taking of such a bound bosom and connecting it by a single row of stitches through the binding to the shirt would involve invention."

VI.

Comments.

Complainants claim universal acquiescence on the part of the public in complainants' rights. The defendants did not acquiesce, neither did Ford, nor Clark, nor Smith of Chatham, and the only persons named is the firm of Hermann, Aukum & Co., who paid a royalty, to what amount the inventor, Robert Cluett, could not state, and as this is the only firm

who paid a license, this should carry little weight, for no doubt this firm considered it more profitable and advantageous to pay a small license fee than involve themselves into a litigation to contest the validity of the patent, which would necessarily entail heavy expenses, large fees, loss of time, inconvenience and several years in the Courts.
However such acquiescence might be material upon a motion for a preliminary injunction, it is of no consequence upon the final hearing determining the rights of the parties.

Neither does the question that others, including one of the defendants, Hermann, received patents for improvements in shirts from the Patent Office affect the issue. The opinion of these parties on this point can no more be binding upon them, or either of them, nor on the defendants herein, than the Patent Office's opinion in granting a patent is binding upon the Court upon the question of invention. The claim that Cluetts owe their entire success to this patent is as ridiculous as a claim on the part of the defendants would have been that they owe their entire success to the fact that they did not own this patent.

Now, when counsel admits, as he does, that shield shaped bosoms, folded bindings, bound bosoms, securing bosoms to the body of the shirt by a row of stitches (p. 37) are all old devices, how can he consistently argue (p. 52) that the Cluett improvement was not an obvious thing or could not be called a simple thing; that it was needed for years; that it was not the outcome of the prior state of the art, but was the fruitage of a careful study.

With the state of the art as it existed and with the foregoing admissions of counsel, one may intelligently ask what is there in the whole of the Cluett patent that was not known and used years before the date of the patent.

Conclusion.

In Dreyfus *vs.* Searle, 124 U. S., p. 60, it was held that letters patent for imparting age to wines were void for want of patentable invention.

In Munson *vs.* Mayor, 124 U. S., p. 601, letters for new and useful improvements in preserving, filing and canceling bonds were declared void for want of patentable novelty.

In Forncrook *vs.* Root, 127 U. S., p. 176, it was held "that upon the evidence, the manufacture of honey frames by bending and uniting the ends of a blank consisting of a single piece as described in the patent was not at the date of the alleged invention a patentable novelty."

In Hendy *vs.* Golden State Works, 127 U. S., p. 370, it was held, that putting rollers under an article so as to make it movable when without the rollers it would not be movable does not involve the inventive faculty and is not patentable.

In the cases of

Holland *vs.* Shipley, 127 U. S., 396.
Mosler Safe Company *vs.* Mosler Bahmann Co., 127 U. S., p. 354.
Crescent Co. *vs.* Goddfried, 128 U. S., p 158.
Collins Co. *vs.* Coes, 130 U. S., p. 56.
Brown *vs.* District of Columbia, 130 U. S., 87.
Peters *vs.* Hanson, 129 U. S., p. 541.
Pattee Plow Co. *vs.* Kingman, 129 U. S., p. 294.
Peters *vs.* Active Mfg. Co., 130 U. S., p. 626.
Marchand *vs.* Emken, 132 U. S., p. 195.
Royer *vs.* Roth, Id., p. 201.
St. Germain *vs.* Brunswick, 135 U. S., p. 227.

the bills were dismissed in the lower courts for want of patentable novelty, and the judgments affirmed by this Court on appeal.

In Burt *vs.* Every, 133 U. S., p. 349, it was held that a

person to be entitled to a patent must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new or useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced it has not been known, and that it is useful, but it must amount to an invention or discovery, and in Aron *vs.* Manhattan R. R. Co., 132 U. S., p. 84, it was held if changes in old instrumentalities to adapt them to the use contemplated involved only the exercise of ordinary mechanical skill, they do not sanction a patent.

And the Court's attention is directed to the recent decisions of this Court:

Shenfield *vs.* Nashawannuck Co., decided November 3, 1890; and
French *vs.* Carter, decided November 24, 1890.

in both of which cases the patents were declared void for want of invention.

The decree of the Circuit Court ought to be affirmed with costs.

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